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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1949.

No. 577

HARTFORD FIRE INSURANCE COMPANY,
A CORPORATION,
Petitioner,

vs.

DOMENICO ROBERTO AND VINCENZO AMMIRATI,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

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No. .....

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A CORPORATION,

Petitioner,

vs.

DOMENICO ROBERTO AND VINCENZO AMMIRATI,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Petitioner, Hartford Fire Insurance Company, a corporation of Connecticut, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Ciruit, filed and rendered on October 27th, A.D. 1949 (R. 337-344 incl., 177 Fed. 2d, 811) which judgment became final by the overruling of Petitioner's petition for rehearing on the 7th day of December, 1949 (R. 366) by which final judgment the judgment of the District Court of the United States, for the Northern

District of Illinois, Eastern Division, was affirmed (R. 337-344). Mandate has been stayed to give Petitioner an opportunity to apply to this Court for Writ of Certiorari (R. 370).

STATUTES RELIED UPON TO SUSTAIN THIS COURT'S JURISDICTION AND PETITIONER'S RIGHT TO HAVE WRIT OF CERTIORARI GRANTED.

Petitioner relies upon the provisions of 28 U.S.C.A. Section 1254 to have a Writ of Certiorari granted and to sustain the jurisdiction of this Court.

OTHER FEDERAL STATUTES INVOLVED.

This case presents highly important Federal questions not heretofore decided by this Court. Among others, these questions arise out of the construction of, and application to the peculiar facts in this case of Title 8 U.S.C.A. Section 41 (which was a part of the Civil Rights Act of 1870), as well as 28 U.S.C.A. Section 1332, (old statute formerly Section 41 of Title 28 U.S.C.A.). There is also involved the question, as to whether there is any Congressional enactment that gives a deported alien whose citizenship has been cancelled and who is forever forbidden from again entering our land, the right to sue in our Courts. There is also involved the question as to whether such deported alien should be granted special immunity from performing his contractual obligations in order to enable him to recover when all respectable citizens of our country are not granted such immunity but the same is denied to them.

U.S.C.A. Title 8, Section 41, provides as follows:

"All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

U.S.C.A. Title 28, Section 1332 (formerly 28 U. S. C. A. Section 41) provides, among other things, the following:

"(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $3,000 exclusive of interest and costs, and is between:

(1) * * * * * * * * * * * *

(2) Citizens of a State, and foreign states or citizens or subjects thereof;

* * *"

SUMMARY STATEMENT OF THE CASE.

PARTIES INVOLVED.

Petitioner is a corporation organized and existing under and by virtue of the laws of the state of Connecticut, engaged in carrying on the general business of a fire insurance company (R. 14, 5 to 9 inclusive).

Respondent Roberto is a denaturalized and deported alien living in Italy since his deportation in January, 1935, and is forbidden from again entering this country (R. 155 to 158 incl.).

Respondent Ammirati's first citizenship papers were cancelled by the District Court of the United States for the Northern District of Illinois on February 17, 1932

(R. 162, 163). While he remained constantly in this country since that time, he did not become a naturalized citizen again until 1946 (R. 162, 163, 202).

NATURE OF THE CASE.

In the case at bar Respondents sued Petitioner under a standard fire insurance policy for an alleged and claimed loss by fire alleged to have occurred about 2:00 A. M. in the early morning of January 15, 1936, to a building situated in Chicago Heights, Illinois (R. 3 to 10, incl. 135). This suit was started, instituted and begun on the 18th day of November, 1936 (R. 11). It was tried and decided in the United States District Court on the 18th and 19th days of May, 1948 (R. 123, 291, 292). During this period of twelve years Lt. Schultz, the police officer on duty at the time and place in question when the occurrence happened, died (R. 166). The deputy fire marshal, Frank E. Doherty, who investigated the matter also died (R. 164). Both respondents, during the war, being citizens of Italy, alien enemies, the case could not be tried in our courts between the time Italy declared war on us and the Treaty of Peace was finally consummated, which was some time in September, 1947. *Ex Parte Don Ascanio Colonna,* 314 U. S. 510, 86 L. Ed. 379.

SOME OF THE MATERIAL FACTS.

Respondent Roberto was born a subject of Italy. After he was naturalized his citizenship papers were cancelled. On May 2nd, 1932, Roberto was convicted of perjury in connection with his application for citizenship in the United States District Court for the Northern District of

Illinois, Eastern Division (R. 155). On July 15, 1932 this judgment of conviction was affirmed by the Seventh Circuit Court of Appeals (R. 155). Roberto was received and imprisoned in the Federal Penitentiary at Leavenworth, Kansas, on July 23, 1932, where he was confined until discharged with an allowance for good behavior on February 28, 1934 (R. 155 and 156).

Some time previous to February 20, 1933 the Secretary of Labor acting through the Commissioner of Immigration and Naturalization, issued a warrant for the arrest of respondent Roberto which was served upon him in the penitentiary at Leavenworth, Kansas, where two hearings were held thereon, on to wit, February 20, 1933, and June 9, 1933 (R. 156). As a result of such hearings, the Secretary of Labor on the 26th day of July, 1933, entered an order of deportation and for a warrant of deportation of respondent, Roberto (R. 156).

On February 28, 1934, the authorities by virtue of said deportation warrant took charge of Roberto at the said Federal Penitentiary and removed and delivered him to the Port of New York where the said Roberto was scheduled for deportation on March 9th, 1934 (R. 156).

On March 5th, 1934, a Petition for a Writ of Habeas Corpus on behalf of Roberto was filed in the United States District Court for the Southern District of New York which, upon hearing, resulted in its dismissal on March 27th, 1934 (R. 156). From this judgment of dismissal, an appeal was prosecuted to the Second Circuit Court of Appeals which court on the 29th day of March, 1934, admitted Roberto to bail in the penal sum of $7,500.00 and thereafter until about January 1st, 1935 the said respondent, Roberto, remained out free on bail (R. 156, 157).

On the 21st day of May, 1934 the said Second Circuit Court of Appeals affirmed the judgment of said United States District Court (R. 157).

Thereafter and on October 8th, 1934, this Court denied a petition for Writ of Certiorari which made said Order and Warrant for deportation final and binding (R. 157). On the 5th day of January, 1935 Roberto was deported to Italy (R. 157).

Respondent Ammirati likewise born a subject of Italy had his first citizenship papers cancelled on February 17, 1932. Thereafter he remained in this country as a foreign alien until 1946 when by order of the trial court he again became a naturalized citizen (R. 162, 163).

ROBERTO PROCURED THE POLICY OF INSURANCE IN QUESTION WITHOUT REVEALING ANY OF THE MATERIAL FACTS.

The policy of insurance in question was procured by the respondent Roberto himself from the Defendant (R. 161, 168). It was procured on October 20, 1934 (R. 5 to 8 incl.). This was twelve days after this court had denied a Petition for Writ of Certiorari thus making Roberto's deportation final (R. 157). Roberto was then exercising his freedom only because of his posted bond (R. 157).

When Roberto procured the policy in question he concealed and did not reveal any of these material facts (R. 170).

At this time Roberto knew and was certainly impressed with the following outstanding material facts:

(a) That his order of deportation was final and had been made final by the order of this court denying his Petition for Writ of Certiorari.

(b) That he, Roberto, would on being deported to Italy be forever forbidden from again entering this country.

(c) That after such deportation he could never enjoy personal possession or occupancy of the property in question or have personal access thereto.

(d) That if a loss were to occur he could not personally appear and perform any of the contractual obligations imposed upon him by the contract, such as submitting to an examination under oath, as all respectable American citizens are required and must do.

(e) That he, Roberto, was not exercising his freedom by the rights of a free citizen or a free foreign alien enjoying the privileges of our country but on the contrary was enjoying his freedom only by virtue of his posted bond.

THE EVIDENCE IS WITHOUT DISPUTE THAT NEITHER THE PETITIONER'S ISSUING AGENT, ITS SUPERVISING UNDERWRITER, NOR ITS ACTIVE EXECUTIVES SUPERVISING UNDERWRITING HAD ANY ACTUAL KNOWLEDGE OF THESE MATERIAL FACTS. THAT IF SUCH KNOWLEDGE HAD BEEN ACTUALLY POSSESSED, THE POLICY WOULD NOT HAVE BEEN WRITTEN AND IF WRITTEN, WOULD HAVE BEEN CANCELLED.

It is without dispute in the evidence that W. H. Donovan, Jr. was the agent of the petitioner issuing the policy in question (R. 167, 168); that at the time the policy was issued he did not have any knowledge of the deportation or habeas corpus proceedings (R. 168-170 incl.); that if he had had knowledge of these facts he would not have issued the policy (R. 170). It is likewise without dispute that this agent had no knowledge that Ammirati's citizenship papers had been cancelled (R. 170, 171). It is likewise without dispute that if he had ever read the two newspaper items pertaining to Roberto's conviction (published in the name of "Roberts") for perjury, he did not have such facts presently in mind on the 20th day of October, 1934, the date of issuing the policy (R. 177, 178).

It is likewise without dispute in the evidence that Petitioner's supervising underwriter, Schilke, had no knowledge

of any of these facts. That if he had had knowledge of the facts, he would have required the policy to be cancelled (R. 178-184 incl.). The Petitioner's two assistant managers, Purcell and Behlmer, in charge of underwriting, testified that if they had had knowledge of these facts, they would not have accepted the business (R. 186, 187, 189).

THE REFUSAL OF THE TRIAL COURT TO PERMIT PETITIONER TO READ TO THE JURY IN THE REGULAR WAY THE FACTS AND EXHIBITS STIPULATED.

The trial court permitted Respondents to read to the Jury in the regular way, all provisions in the two stipulations entered into by the parties, beneficial to the Respondents (R. 145-153 incl.). The trial court refused to permit Petitioner, in the regular way, to read the facts and exhibits stipulated, beneficial to Petitioner, on the ground there was no dispute about these facts (R. 152 to 158 incl.). A careful examination of the record will show conclusively that the Jury could not have possibly known what facts were stipulated that were beneficial to Petitioner (R. 128, 145-158 incl.).

THE LOWER COURTS FAILED TO FOLLOW THE DECISIONS AND THE LAW OF THE STATE OF ILLINOIS TO THE EFFECT THAT THE KNOWLEDGE OF AN AGENT ACQUIRED IN THE TRANSACTION OF HIS OWN OR ANOTHER'S BUSINESS IS NOT THE KNOWLEDGE OF HIS PRINCIPAL UNLESS SUCH AGENT HAD SUCH KNOWLEDGE PRESENTLY IN MIND AT THE TIME OF ACTING FOR SUCH PRINCIPAL.

That this is the law of the State of Illinois there can be no doubt.

O'Donnell v. *Henley,* 327 Ill. 406, at 409.

The United Disposal and Recovery Co. v. *The Industrial Commission, et al.,* 291 Ill. 480, at 485.

Gammon v. *Huse,* 100 Ill. 234, at 240 and 241.

The People v. *Gullborg,* 324 Ill. 538, at 539.

THE LOWER COURTS, UNDER THE DECISIONS OF THIS COURT, WERE REQUIRED TO FOLLOW AND APPLY THE LAW OF THE STATE OF ILLINOIS.

Erie R. R. Co. v. *Tompkins,* 304 U. S. 64, 82; 82 Law Ed. 1188.

Rosenthal v. *New York Life Ins. Co.,* 304 U. S. 263; 82 Law Ed. 1330.

Hudson v. *Pius Moonier,* 304 U. S. 397; 82 Law Ed. 1422.

West v. *American Tel. & Tel. Co.,* 311 U. S. 223; 85 Law Ed. 138.

While the evidence is clear and without dispute that Petitioner and its agents had no knowledge of the material and concealed facts hereinbefore discussed, it must however, be true that Petitioner at least was entitled to have

the Jury instructed as to the law on this phase of the case in accordance with the law of Illinois, which the trial court refused to do (R. 217).

THE RULING OF THE LOWER COURTS TO THE EFFECT THAT ROBERTO WAS RELIEVED FROM PERFORMING HIS CONTRACTUAL OBLIGATIONS OF APPEARING IN COOK COUNTY TO SUBMIT TO AN EXAMINATION UNDER OATH.

After the loss occurred Petitioner demanded that Roberto appear and submit to an examination under oath at any time or place within Cook County, Illinois (R. 44-75 incl.). The holding of both lower courts is stated in the Court of Appeals' opinion, as follows:

> "On this issue we agree with and approve the statement of the trial court herein:
>
> > "'* * * while Roberto himself was responsible for the acts which brought about the cancellation of his citizenship papers and his deportation to Italy, nevertheless his inability to appear in Cook County for examination under oath is due to the fact that the United States Government will not permit him to come here. He is prevented from carrying out the provisions of his contract by the mandate of the Government, not through his own volition. Under the circumstances it is impossible for him to appear for examination. Here the Insurance Company has had the benefit of his co-plaintiff and the co-owner of the property appearing and being examined under oath.
> >
> > "'I am of the opinion that under all the circumstances Roberto was relieved from appearing in Cook County for examination under oath.'"

(R. 342, 343; 177 Fed. 2d 811, at 815.)

PETITIONER'S POSITION.

Petitioner's position in the lower courts was and still is that:

(1) Respondent Roberto, a deported alien, who had had his citizenship papers cancelled and who had been forcibly deported to the land from whence he came and who was forever forbidden from again entering this country, could not and can not use the facilities of our courts to sue a citizen of this nation.

(2) Neither a deported alien nor any other alien has the constitutional right to sue in our courts.

(3) There is no Act of Congress that expressly or by implication gives to Respondent Roberto the right to sue in our Courts.

(4) The District or trial court had no jurisdiction to entertain this suit because Respondent Roberto was a party plaintiff thereto.

(5) That Respondent Roberto's position and situation was in no way caused by any act of omission or commission by this Petitioner but on the contrary, was caused and brought about by Roberto's own acts and his life of crime.

(6) It is against the public policy of this nation to permit a deported alien whose citizenship papers have been cancelled and who is forever forbidden from again re-entering our nation, to recover in our courts upon a contract procured by fraudulently concealing and not revealing material facts which it was his duty to reveal even though no inquiry was made at the time.

(7) It is against the public policy of this nation to permit such a deported alien to recover upon such a contract when he did not and could not perform his contractual obligation because of his own overt acts and criminal conduct, when this nation's own respectable citizens are positively required to perform such contractual obligations in order to maintain a suit to recover.

(8) Petitioner was entitled to have this case tried and its liability, if any, determined by the laws of the State of Illinois as the same have been determined and announced by the decisions of her own Supreme Court.

(9) Under the Constitution of this nation, and particularly the Fifth Amendment thereto, Petitioner was entitled to read to the Jury the stipulated facts and exhibits and not leave to speculation, guess and conjecture as to whether the Jury knew or did not know what had or what had not been stipulated.

(10) Under the same Constitution, your Petitioner was entitled to read to the Jury the stipulated facts and exhibits without the trial court, by words and acts, impressing upon the Jury his idea that such facts and exhibits were immaterial and constituted no defense.

THE JUDGMENT OF THE DISTRICT COURT.

This case was tried before the District Court and a Jury in the manner hereinbefore described. It resulted in a verdict for Respondents for the full amount for which suit was brought, to wit, the sum of Fifty-six Hundred Dollars ($5600) with interest at five per cent (5%) per annum even for those years when the case could not be tried under the decisions of this Court because both Respondents were then alien enemies (R. 291). The trial court rendered judgment in favor of the Respondents in accordance with the said verdict (R. 292).

THE JUDGMENT OF THE COURT OF APPEALS.

The Court of Appeals affirmed the judgment of the District Court (R. 337-344 incl. 177 Fed. 2d 811). The Court of Appeals, in its judgment of affirmance, in substance and effect held:

(a) That Respondent Roberto had a lawful right to enter into the contract in question. (R. 339, 340; 177 Fed. 2d, 811 at 813 and 814).

(b) That Respondent Roberto had a lawful right to maintain this suit in our courts (R. 339, 340; 177 Fed. 2d, 811 at 813 and 814).

(c) That Respondent Roberto was not guilty of fraudulent concealment because no questions were asked of him (R. 340, 341, 342; 177 Fed. 2d, 811 at 814 and 815).

(d) That Petitioner had knowledge of the cancellation of Roberto's citizenship papers and that he had been convicted of perjury because of the news items appearing in the Chicago Heights newspaper describing him under the name of "Domenick Roberts" (R. 341, 342; 177 Fed. 2d, 811 at 815).

(e) That Petitioner was charged with the knowledge of the concealed facts because William H. Donovan, Sr., who under the undisputed evidence, only performed the perfunctory duty of signing the policy of insurance (R. 168, 175), had handled real estate transactions for Respondents (which was only in the matter of taking an acknowledgment to deeds as a notary public), and had sold Respondents other insurance (R. 338; 177 Fed. 2d, 811 at 813).

(f) That Roberto's acts in concealing material facts were not fraudulent (R. 341, 342; 177 Fed. 2d, 811 at 815).

(g) That Roberto was excused from performing his contractual obligation of submitting to an examination under oath even though our law-abiding citizens must so submit, because the Government would

not permit Roberto to again enter our country (R. 342, 343; 177 Fed. 2d, 811 at 815).

(h) That Petitioner was not prejudiced by the trial court's refusing Petitioner the right to read the stipulated facts and exhibits because they had been orally admitted (R. 343; 177 Fed. 2d, 811 at 815).

(i) That no other assignment of errors merited any consideration (R. 343; 177 Fed. 2d, 811 at 815).

QUESTIONS PRESENTED

I.

Does Section 41, Title 8, U. S. C. A. give to an alien who was once a naturalized citizen, but whose citizenship papers had been cancelled, and who was under a valid and binding order of deportation, due solely to his own criminal acts and conduct, under the terms of which order, and under our law he could never re-enter this country, the right to procure and enforce an insurance contract, when at the time of procuring the contract he concealed and did not reveal his true status, or that he was then exercising his freedom by virtue of a posted bond?

II.

Does Section 1332, Title 28, U. S. C. A. (formerly Section 41 of Title 28, U. S. C. A.) give to such denaturalized and deported alien, after his deportation, the right to bring suit in our courts to recover under such contract for a loss occurring after his deportation, and after he no longer could enter this country?

III.

Is there any other federal statute that gives such denaturalized and deported alien the right to maintain such a suit in the courts of this country?

IV.

Does either of the above federal statutes, or any other enactment of Congress give such denaturalized and deported alien the right to maintain such suit, and does either of the above statutes, or any other statutes enacted by our Congress, give the United States District Court jurisdiction to entertain such suit by such denaturalized and deported alien?

V.

Can such denaturalized and deported alien be excused and granted immunity from performing his own contractual obligation under such contract because he is forbidden from again entering this nation, on account of the laws and inhibitions of this nation, when this nation's own respectable citizens are positively required to perform such contractual obligation in order to maintain a suit to recover under such contracts?

VI.

Is it or is it not against the public policy of this nation to permit such a denaturalized and deported alien to recover upon such a contract procured by fraudulently concealing and not revealing material facts which it was such alien's duty to reveal, even though no inquiry was made at the time?

VII.

Is it or is it not against the public policy of this nation to permit such a denaturalized and deported alien to recover upon such a contract when he did not and could not perform his contractual obligations, such as submitting to an examination under oath, when this nation's own respectable citizens are positively required to perform such contractual obligations in order to maintain a suit to recover?

VIII.

Did or did not the lower courts fail to apply the law of the State of Illinois, as the same has been determined and announced by the decisions of the Courts of Illinois, upon the question of whether the defendant, the petitioner, was or was not imparted with knowledge of the material facts which respondents failed to reveal at the time they procured the policy or contract of insurance in question?

IX.

Was or was not the petitioner denied its constitutional rights, particularly under the Fifth Amendment to our Constitution, and was or was not petitioner's property taken without due process of law by the District Court's refusal to permit petitioner to read to the jury the stipulated facts and exhibits?

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT.

I.

The seven questions raised and presented under the sub-head of this petition entitled "Questions Presented", Divisions I to VII inclusive, present highly important federal questions in construing our federal statutes and congressional enactments, as well as the public policy of this nation, which questions have not been determined or passed upon by this court.

II.

That there is presented as set forth in this petition under the sub-head "Questions Presented", Division VIII, the question as to whether the lower courts did or did not apply the laws of the State of Illinois, as announced by the highest court of that state, in determining the question as to whether the petitioners were or were not in any way imparted with notice or knowledge of the material facts which respondents failed to reveal at the time they procured the policy or contract of insurance in question.

III.

That there is presented the questions as to whether petitioner was or was not denied its constitutional rights, and particularly under the Fifth Amendment to our Constitution, and whether petitioner was or was not denied a fair and impartial trial before a jury, in violation of the Seventh Amendment, and whether petitioner's property was or was not taken without due process of law by the District Court's

refusal to permit petitioner to read in the ordinary manner to the jury the stipulated facts and exhibits.

IV.

That this court should exercise its power of supervision bceause the Court of Appeals departed and sanctioned such departure by the Trial Court from the accepted and usual course of judicial proceedings, by approving and affirming the judgment and action of the Trial Court in refusing to permit petitioner to read to the jury, in the usual and customary way, the stipulated facts and exhibits beneficial to petitioner, in order that the jury would know and thoroughly understand what facts had been admitted.

WHEREFORE, it is respectfully submitted that Petitioner's prayer for a Writ of Certiorari to review said judgment of the United States Court of Appeals for the Seventh Circuit should be granted.

HARTFORD FIRE INSURANCE COMPANY,
By CLARENCE G. MYERS,
CHARLES F. SNERLY,
J. EUGENE LOEB,
Its Attorneys.

BRIEF AND ARGUMENT.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

STATEMENT OF THE CASE.

Reference is made to the foregoing petition for summary statement of the case, citation to opinions below, and statement as to jurisdiction.

II.

SPECIFICATIONS AND ASSIGNMENTS OF ERROR.

Petitioner adopts "Questions Presented" in the foregoing petition on pages 14 to 16, inclusive, as petitioner's specifications and assignments of error.

III.

SUMMARY OF ARGUMENT.

Petitioner adopts "Reasons Relied upon for the Allowance of the Writ" in the foregoing petition on pages 17 and 18 as its Summary of Argument.

IV.

ARGUMENT.

1.

RESPONDENT ROBERTO, A DENATURALIZED AND DEPORTED ALIEN, HAS NO CONSTITUTIONAL RIGHT TO SUE IN OUR COURTS.

In the case of *Heine* v. *New York Life Insurance Co.* (9 C. C. A.) 57 Fed. 2d, 382, a citizen of Germany sued the Defendant on a policy written in Germany to be paid according to the German law and in German marks.

In speaking upon the jurisdiction of our courts, that court on page 386 said:

> "No alien has a constitutional right to sue in the United States courts. *Kline* v. *Burke Construction Co.*, 260 U. S. 226, 43 S. Ct. 79, 67 L. Ed. 226, 24 A. L. R. 1077. The United States District Courts have such jurisdiction as the Congress confers."

See also *The Disconto Gesellschaft* v. *Augustus C. Umbreit*, 208 U. S. 570, 52 L. Ed. 625.

See also: The authorities cited and quoted from under Division 2 of this Argument.

2.

THE UNITED STATES DISTRICT COURTS ONLY POSSESS AND HAVE THAT JURISDICTION EXPRESSLY BESTOWED UPON THEM BY THE CONGRESS.

In the case of *Kline* v. *Burke Construction Co.*, 260 U. S. 226, 67 L. Ed. 226, the court in speaking upon the jurisdiction of the Federal Courts on page 235 of 260 U. S. and page 232 of 67 L. Ed. said:

"Only the jurisdiction of the Supreme Court is derived directly from the Constitution. Every other court created by the general government derives its jurisdiction wholly from the authority of Congress. That body may give, withhold or restrict, such jurisdiction at its discretion, provided it be not extended beyond the boundaries fixed by the Constitution." (Citing Cases.) "The Constitution simply gives to the inferior courts the capacity to take jurisdiction in the enumerated cases, but it requires an act of Congress to confer it. *Nashville* v. *Cooper,* 6 Wall. 247, 252, 18 L. Ed. 851, 852. And the jurisdiction, having been conferred, may, at the will of Congress, be taken away in whole or in part; and, if withdrawn without a saving clause, all pending cases, though cognizable when commenced, must fall. *Assessors* v. *Osborne* (*Gates* v. *Osborne*), 9 Wall. 567, 575, 19 L. Ed. 748, 751. A right which thus comes into existence only by virtue of an act of Congress and which may be withdrawn by an act of Congress after its exercise has begun, cannot well be described as a constitutional right." (Emphasis ours.)

In the case of *Lockerty* v. *Phillips,* 319 U. S. 182, 87 Law Ed. 1339, this Court, in speaking upon the jurisdiction of the Federal Courts, on pages 187 and 188 of 319 U. S. and pages 1342 and 1343 of 87 Law Ed., said:

"All federal courts, other than the Supreme Court, derive their jurisdiction wholly from the exercise of the authority to 'ordain and establish' inferior courts, conferred on Congress by Article 3, Section 1, of the Constitution. Article 3 left Congress free to establish inferior federal courts or not as it thought appropriate. It could have declined to create any such courts, leaving suitors to the remedies afforded by state courts, with such appellate review by this Court as Congress might prescribe. *Kline* v. *Burke Constr. Co.*, 260 U. S. 226, 234, 67 L. Ed. 226, 232, 43 S. Ct. 79, 24 A. L. R. 1077, and cases cited; *M'Intire* v. *Wood,* 7 Cranch (U. S.) 504, 506, 3 L. Ed. 420. The Congressional power to ordain and establish inferior courts

> includes the power 'of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good.' " (Citing cases.)

In the case of *Crowell* v. *Benson,* 285 U. S. 22, 76 L. Ed. 598, this Court, in speaking upon the jurisdiction of the Federal Courts, on page 86 of 285 U. S. and on page 632 of 76 L. Ed., said:

> "The 'judicial power' of Article 3 of the Constitution is the power of the federal government, and not of any inferior tribunal. There is in that Article nothing which requires any controversy to be determined as of first instance in the federal district courts. The jurisdiction of those courts is subject to the control of Congress."

In the case of *Aetna Life Ins. Co.* v. *Haworth,* 300 U. S. 227, 81 L. Ed. 617, this Court, in speaking upon the jurisdiction of the Federal Courts, on page 240 of 300 U. S. and page 621 of 81 L. Ed. said:

> "In providing remedies and defining procedure in relation to cases and controversies in the constitutional sense the Congress is acting within its delegated power over the jurisdiction of the federal courts which the Congress is authorized to establish." (Citing cases.)

In the case of *Stevenson* v. *Fain,* 195 U. S. 165, 49 L. Ed. 142, this Court, in speaking upon the question of the jurisdiction of the Federal Courts, on page 167 of 195 U. S. and on page 143 of 49 L. Ed., said:

> "The Supreme Court alone 'possesses jurisdiction derived immediately from the Constitution, and of which the legislative power cannot deprive it' (*United States* v. *Hudson,* 7 Cranch 32, 3 L. Ed. 259), but the jurisdiction of the circuit courts depends upon some act of Congress (*Turner* v. *Bank of North America,* 4 Dall. 8, 10, 1 L. Ed. 718, 719; *M'Intire* v. *Wood,* 7 Cranch 504, 506, 3 L. Ed. 420, 421)."

3.

THERE IS NO ACT OF CONGRESS THAT EITHER EXPRESSLY OR BY IMPLICATION GIVES TO RESPONDENT, ROBERTO, A DENATURALIZED AND DEPORTED ALIEN THE RIGHT TO SUE IN THE UNITED STATES DISTRICT COURTS. NEITHER IS THERE ANY ACT OF CONGRESS THAT EITHER EXPRESSLY OR BY IMPLICATION GIVES THE UNITED STATES DISTRICT COURTS JURISDICTION TO ENTERTAIN AND DETERMINE SUCH A SUIT BROUGHT BY A DENATURALIZED AND DEPORTED ALIEN.

Certainly it was not the intent of Congress, by enacting what is now Title 28, U. S. C. A. Sec. 1332 (formerly Title 28, U. S. C. A. Sec. 41) to give the right to all aliens in all the countries of the world to sue any of our citizens in any of the United States District Courts. Most certainly it was not the intention of the Congress to permit a denaturalized and deported alien the right to resort to our courts and to sue any of our citizens.

Clearly, it was only the intention of Congress to bestow jurisdiction in the United States District Courts where an alien otherwise was authorized to sue our citizens, whether the same be by other Congressional enactments, under a treaty duly ratified and approved, or by the right of comity, if such comity existed. In other words, it was only the intention of Congress by this section to give aliens the right to sue in the United States District Courts where such right had been given or granted otherwise.

By Section 41 of Title 8 U. S. C. A. enacted as part of the Civil Rights Act of 1870, Congress only granted to aliens, *within the jurisdiction of the United States,* the right to sue to enforce contracts et cetera. Certainly by enacting

this section Congress did not intend to give all aliens the right to sue in our courts. It is equally without doubt that Congress by this particular Act, only gave to aliens, who were within the jurisdiction of the United States, the right to sue in our courts. Certainly, if it was the intention of Congress to grant to aliens who were not within the jurisdiction of our courts the right to sue our citizens in our courts, it would have found words sufficient, apt and comprehensive to have so expressed itself.

No one can successfully maintain that it was the intention of the Congress, by enacting this statute, to grant to a denaturalized and deported alien the right to resort to our courts and sue our own citizens.

All the cases relied upon by the Respondent and the Court of Appeals to sustain Respondent Roberto's right to sue, and the District Court's jurisdiction, including the case of *Takahashi* v. *Fish and Game Commission,* 334 U. S. 410 (R. 339, 340; 177 Fed. 2d 811 at 813 and 814), were suits where the alien at all times in question was within the jurisdiction of the United States.

All the cases cited and relied upon by the Court of Appeals to sustain itself, except the *Takahashi* case, were cases where the alien sued to recover for damage to his person negligently or wantonly and wilfully inflicted at a time when the alien was within our nation.

No case cited by the Court of Appeals, or relied upon by Respondents presented a case where a denaturalized and deported alien, forever forbidden from re-entering our nation, was entitled to resort to our courts, or that our courts had jurisdiction to entertain a suit where such denaturalized and deported alien sought to invoke their jurisdiction.

In the case of *Coules* v. *Pharris,* 212 Wis. 558, 250 N. W. 404, the respondent, an alien unlawfully in the country,

had brought a suit against the appellant to recover for wages earned. In reversing the case and holding that the respondent could not recover, and directing that the action be dismissed, the Supreme Court on page 404 of 250 N. W. said:

"It is not disputed that respondent is an alien forbidden by the United States Immigration Laws (see 8 U. S. C. A. Sec. 101 *et seq.*) for the time being at least, to enter or remain in this country. By positive enactment this alien does not have the status of a non-resident alien, or resident alien, and while it may be difficult according to the strict definitions of international law to classify him, it clearly appears that he is a defiant person challenging the ability of this country to enforce its own laws. The disability which he has placed upon himself, it is contended by appellant, deprives the respondent of the right to sue for wages earned while thus unlawfully here. The right to exclude aliens or to limit the number to be admitted is a nation's self-preserving power which may be exercised when treaties do not prevent, whenever in the judgment of the Congress, the interests of the country require its exercise. *Turner* v. *Williams,* 194 U. S. 279, 24 S. Ct. 719, 48 L. Ed. 979; *Gan Tico* v. *Forbes,* 228 U. S. 549, 33 S. Ct. 585, 57 L. Ed. 960; *United States* v. *Williams* (D. C.), 183 F. 904.

"The statute expressly prohibiting aliens from entering this country as this respondent has entered it, creates a public policy of the United States to keep without our borders all who do not come within the quotas or exceptions thereto provided for in the acts of Congress. The respondent's unlawful presence in the country is bound to be attended with restrictions, and among them is the deprivation of the right to sue for wages in the courts of the land he has secretly invaded against the express command of the government thereof.

"We are of the opinion that our courts cannot properly assist one who, while unlawfully here, engages in competition with laborers lawfully here in seeking

benefits to be obtained only by avoiding the law of the land. Denied the means of collecting for his labor, he will not be likely to succeed in maintaining himself and accomplishing his cheat upon the government.

"Counsel for respondent urge in his behalf the protection of the Fourteenth Amendment to the United States Constitution. The United States has extended to resident alien friends practically the same rights and privileges as citizens possess. But this protection cannot be extended so as to give this respondent the right to demand help of the courts in frustrating the plain purpose of congressional acts regulating immigration. *Turner* v. *Williams, supra.* The right of an alien to sue is more a matter of comity than a matter of right. See note 2 C. J. p. 1070; *Disconto Gesellschaft* v. *Umbreit,* 208 U. S. 570, 28 S. Ct. 337, 52 L. Ed. 625; Id. 127 Wis. 651, 106 N. W. 821, 15 L. R. A. (N. S.) 1045, 115 Am. St. Rep. 1063; *Mumford* v. *Mumford* (c. c.), 1 Gall. 366, Fed. Cas. No. 9,918; *Daubigny* v. *Davallon,* 2 Anst. 462. And the circumstances presented by this case show the respondent does not possess the right to demand a hearing in the courts on his claim for wages. In accordance with the public policy the courts will refuse to hear him in such matter.

"Judgment reversed, and cause remanded, with directions to dismiss the complaint."

The case of *Feldman* v. *Murray,* 12 N. Y. Supp. (2nd) 533, relied upon by respondents and cited by the Court of Appeals to sustain its holding, was a case where the alien was within the jurisdiction of the court and was a suit brought for damage for the negligent and wanton and wilful injury to his person. The New York court, in discussing the *Coules* case, on pages 534 and 535 said:

"The facts in the application before this court differ in substantial respects from the facts underlying the ruling by the Wisconsin court. This proceeding is not predicated upon an action for wages, but is for injury to person. It appears to this court that

there is a substantial difference between these two cases. While contract rights might be denied to an individual because he has not complied with certain preliminary requirements in order to acquire certain status in court, nevertheless even the most hopeless outcast is entitled to protection against unlawful injury to his person. In the case of *Janusis* v. *Long*, 284 Mass. 403, 188 N. E. 228, 231, decided by the Supreme Judicial Court of Massachusetts in November, 1933, the facts were that the plaintiff while on the highway was injured as a result of the negligence of the defendant in the operation of an automobile. Among other defenses it was pleaded that at the time of his injuries, the plaintiff was illegally in the United States and subject to deportation, that he was a trespasser and that the defendant violated no legal duty owed to him. *The first question considered by the learned Appellate Court was whether the unlawful presence of the plaintiff in this country was a complete bar to the action. A person does not become an outlaw and lose all human rights by doing an illegal act.*" (Emphasis ours.)

In concluding this division of our brief, we submit that there is no enactment of the Congress, under the undisputed facts in this case, that granted the Respondent Roberto the right to maintain this suit, or gave the United States District Court of the Northern District of Illinois jurisdiction thereof for the following reasons:

1. That at the time the cause of action arose by the casualty in question on the early morning of January 15, 1936, Respondent Roberto was not within the jurisdiction of our courts, but was a denaturalized and deported alien, forever forbidden from again reentering our nation, which condition existed when this suit was brought and tried, and likewise still exists today.

2. That there is no enactment of the Congress that gives such a denaturalized and deported alien the right to sue our citizens in our courts, or to resort to our courts for any purpose whatsoever.

3. That there is no treaty in existence that gives to a denaturalized and deported alien of Italy the right to sue in our courts upon contract, or for any other purpose whatsoever.

4. That the law of comity does not require that a denaturalized, deported alien of any country be permitted to resort to our courts to sue our citizens, or for any other purpose.

5. That the Respondent Roberto was not authorized to resort to our courts for any purpose.

6. That our United States District Courts were never given jurisdiction by our Congress to entertain such a suit by such a denaturalized and deported alien.

7. That if a denaturalized and deported alien has equal or greater rights than the citizens of this nation, then this court should announce this principal so that the constituency of the nation will understand it.

4.

IF A POLICY OF INSURANCE PROCURED BY A NATURAL BORN CITIZEN OF THIS NATION IS VOID BECAUSE SUCH CITIZEN, IN PROCURING THE INSURANCE, CONCEALED AND DID NOT REVEAL MATERIAL FACTS WHICH IT WAS HIS DUTY TO REVEAL, EVEN THOUGH NO INQUIRY WAS MADE, THEN CERTAINLY IT WOULD BE AGAINST THE PUBLIC POLICY OF THIS NATION TO HOLD THAT A DENATURALIZED ALIEN UNDER A VALID ORDER OF DEPORTATION, AND WHO WAS THEN EXERCISING HIS FREEDOM BY A POSTED BOND, COULD PROCURE AN ENFORCEABLE CONTRACT BY FRAUDULENTLY CONCEALING AND NOT REVEALING MATERIAL FACTS WHICH IT WAS HIS DUTY TO DISCLOSE, EVEN THOUGH NO INQUIRY WAS MADE.

Moral hazard was defined in the case of *Syndicate Ins. Co.* v. *Bohn, et al.*, 65 Fed. 165, by the much lamented Judge Sanborn, as follows:

> "Moral hazard in insurance, is but another name for pecuniary interest in the insured to permit the property to burn. Statistics, experience and observation all teach that the moral hazard is least when the pecuniary interest of the insured in the protection of the property against fire is greatest, and that the moral hazard is greatest when the insured may gain most by the burning of the property."

If the existence of this true situation as disclosed by the evidence would affect the moral hazard or the risk in any respect under the law, it was the clear duty of the Respondent to disclose these facts and inform this Petitioner thereof.

The courts of Kentucky in the case of *Queens Ins. Co.* v. *Cummins,* 206 Ky. 300, 267 S. W. 144, at page 146, in speaking upon this duty on the part of the assured, said:

> "When a man takes insurance he is asking someone else to take a risk he is unwilling to carry himself, and common honesty requires that he give to the insurer all the information he has regarding the risk"; and, continuing, "An applicant for fire insurance, whether inquiry was made of him or not, was bound to communicate all facts known to him and by him believed to be material, and his failure to do so must be regarded as a concealment; *and it is to be presumed that he knew and believed what men of ordinary intelligence know and believe.*" (Emphasis ours.)

In the case of *Fireman's Fund Ins. Co.* v. *McGreevy,* (8 C. C. A.) 118 Fed. 415; the assured had purchased the property for $500.00 and insured it for $3500.00 and concealed this fact from the insurance company when the insurance was written. No questions were asked and no representations made by the assured to procure the insurance. The court, in holding that this voided the policy as a matter of law, on pages 418 and 419, said:

> "Where the evidence leaves any doubt as to the existence of a fact, the matter should be left to the jury; but where it is established by all the evidence on both sides the jury cannot be permitted to find to the contrary. And, in respect to concealments, the materiality of matter concealed may, as in this case, be so apparent that it should not be left open to a jury to find it not material."

In the case of *Sebring* v. *Fidelity-Phenix Fire Ins. Co. of New York,* 255 N. Y. 382, 174 N. E. 761, the plaintiff had entered into a contract to sell the property to one Hubbard, whom, as an attorney at law, plaintiff had represented. Hubbard had been involved in various actions against insurance companies and at one time had been

convicted of conspiracy to defraud insurance companies. Plaintiff had the policies endorsed to show that the title was in the plaintiff, but subject to a sales contract to one Hubbard. The plaintiff failed to disclose Hubbard's record. No questions were asked and no representations made by the plaintiff. The court, in reversing a judgment for the plaintiff, held that this fraudulent concealment was in violation of the clause against fraud and false swearing, and on pages 762 and 763 of 174 N. E., said:

> "Concealment is the designed and intentional withholding of any fact material to the risk which the assured in honesty and good faith ought to communicate to the underwriter. * * * If the applicant is aware of the existence of some circumstance which he knows would influence the insurer in acting upon his application, good faith requires him to disclose the circumstance, though unasked. * * * In this case is involved the question whether plaintiff's failure to disclose important events alleged to have occurred in Hubbard's career previous to the execution of the amended contract affected the making of that contract and whether his reticence on that subject resulted from a fraudulent intent to induce the making of a contract from which defendant, in exercise of ordinary business prudence, would have remained aloof."

In the case of *Stipcich* v. *Metropolitan Life Ins. Co.*, 277 U. S. 311, 72 Law Ed. 895, this Court in speaking upon this question, on page 316 of 277 U. S. and page 898 of 72 Law Ed. said:

> "Insurance policies are traditionally contracts *uberrimae fidei* and a failure by the insured to disclose conditions affecting the risk, of which he is aware, makes the contract voidable at the insurer's option. *Carter* v. *Boehm*, 3 Burr. 1905, 97 Eng. Reprint, 1162, 13 Eng. Rul. Cas. 501; *Livingston* v. *Maryland Ins. Co.*, 6 Cranch 274, 3 L. Ed. 222; *M'Lanahan* v. *Universal Ins. Co.*, 1 Pet. 170, 7 L. Ed. 98; *Phoenix Mut. L. Ins. Co.* v. *Raddin*, 120 U. S. 183, 189, 30 L. Ed. 644, 646, 7

Sup. Ct. Rep. 500; *Hardman* v. *Firemen's Ins. Co.* (C. C.), 20 Fed. 594.

"Concededly, the modern practice of requiring the applicant for life insurance to answer questions prepared by the insurer has relaxed this rule to some extent, since information not asked for is presumably deemed immaterial. *Penn. Mut. L. Ins. Co.* v. *Mechanics' Sav. Bank & T. Co.*, 38 L. R. A. 33, 19 C. C. A. 286, 37 U. S. App. 692, 72 Fed. 413, 435-441. See *Clark* v. *Manufacturers' Ins. Co.*, 8 How. 235, 248, 249, 12 L. Ed. 1061, 1066; compare *Phoenix Mut. L. Ins. Co.* v. *Raddin*, 120 U. S. 183, 190, 30 L. Ed. 644, 646, 7 Sup. Ct. Rep. 500.

"But the reason for the rule still obtains, and with added force, as to changes materially affecting the risk which come to the knowledge of the insured after the application and before delivery of the policy. For, even the most unsophisticated person must know that in answering the questionnaire and submitting it to the insurer he is furnishing the data on the basis of which the company will decide whether, by issuing a policy, it wishes to insure him. If, while the company deliberates, he discovers facts which make portions of his application no longer true, the most elementary spirit of fair dealing would seem to require him to make a full disclosure."

In the case of *New York Life Ins. Co.* v. *Gay*, 36 Fed. (2d) 634, the Circuit Court of Appeals for the Sixth Circuit, in speaking upon this question on page 638, said:

"It is well settled that the suppression of a material fact which a party is bound in good faith to disclose is equivalent to a false representation. *Tyler* v. *Savage*, 143 U. S. 79, 12 S. Ct. 340, 36 L. Ed. 82. And fraud vitiates the most solemn contracts and documents, and even judgments. *United States* v. *Throckmorton*, 98 U. S. 61, 25 L. Ed. 93; *Minneapolis, St. Paul, etc., R. Co.* v. *Rock*, 279 U. S. 410, 49 S. Ct. 363, 73 L. Ed. 766."

In the case of the *Harrison State Bank* v. *United States*

Fidelity & Guaranty Co., et al., 94 Mont. 100, 22 Pac. (2d) 1061, the court in speaking upon this question on page 1064 of 22 Pac. (2d) said:

> "We then have the proposition of the cashier of the bank, applying for insurance on behalf of the bank, with the knowledge that the risk of the surety is greater than ordinary because of a proposed hold-up of which he apparently knows every detail and the risk further increased by a fantastic scheme to allow the robbery to take place and then capture the robbers. To uphold such a contract would be to place a premium upon fraud. And it makes no difference that there may have been no active intent to defraud. The relations of the parties required the fullest disclosure of matters material to the risk, and any concealment of a material fact known to a party, increasing the ordinary risk, would be deemed in law to be fraudulent. *Griswold* v. *Hazard*, 141 U. S. 260, 11 S. Ct. 972, 35 L. Ed. 678; *First National Bank* v. *Clark's Estate*, 59 Colo. 455, 149 P. 612, 614."
>
> "It follows that the trial court was correct in sustaining the motion of the respondent United States Fidelity & Guaranty Company for a directed verdict."

The following cases clearly announce and follow the same principle of law:

Btesh, et al. v. *Royal Ins. Co., Ltd.*, 49 Fed. (2d) 720, at pages 721 and 722.

Davis Scofield Co. v. *Agricultural Ins. Co.*, 109 Conn. 673, 145 Atl. 38, at p. 40.

Miller v. *Security Ins. Co. of New Haven*, 131 Cal. App. 217, 21 Pac. (2d) 659, at p. 661.

Great American Ins. Co. v. *Clayton*, 247 Ky. 612, 57 S. W. (2d) 467, at p. 469, 99 S. W. (2d) 172.

Fidelity-Phenix Fire Ins. Co. v. *Mears*, 259 Ky. 733, 83 S. W. (2d) 467, at 469, 470.

4 a.

CERTAINLY THE FACTS CONCEALED WERE SUCH MATERIAL FACTS WHICH A REASONABLE MAN SHOULD HAVE KNOWN TO HAVE BEEN MATERIAL TO THE RISK, THE EVIDENCE BEING WITHOUT DISPUTE THAT PETITIONER WOULD NOT HAVE ISSUED THE POLICY, OR WOULD HAVE CANCELLED IT, HAD IT KNOWN SUCH FACTS. (R. 170, 171, 186, 187, 189.)

It is only a conservative statement to say that no underwriter of ordinary ability or for that matter, any person with ordinary intelligence, exercising ordinary care and caution, would write a contract of indemnity to protect such a denaturalized and deported alien against loss to his property. This is especially true when, after exhausting all his remedies in the Courts and even after applying to this court for a Writ of Certiorari, he was still under a binding Order of Deportation and would be forever forbidden from again re-entering this country.

It is certainly to be presumed that Roberto knew and believed what men of ordinary intelligence know and believe. It must necessarily follow that after Roberto had experienced all the different proceedings had against him not only in his criminal prosecution and conviction and denaturalization proceedings, but also in the deportation and habeas corpus proceedings he knew and fully realized that if such facts were known, it would prevent him from procuring or purchasing insurance.

4 b.

IT IS AGAINST THE PUBLIC POLICY OF THIS NATION TO REQUIRE AN INSURANCE COMPANY TO MAKE PERSONAL AND EMBARRASSING INQUIRY OF A PERSON OF FOREIGN BIRTH, WHETHER HE BE NATURALIZED OR NOT, AND WHETHER HE BE HONORABLE OR NOT, IN ORDER TO ASSERT THE DEFENSE OF FRAUDULENT CONCEALMENT.

According to the judgment of the trial court, and under the holding of the court of appeals, the petitioner can not take advantage of the defense of fraudulent concealment (R. 341, 177 Fed. (2d) 811, at 814) because the petitioner's agent, at the time Roberto applied for the insurance, failed to propound the following inquiry:

(a) Have you ever become a naturalized citizen?
(b) If so, have your citizenship papers ever been cancelled?
(c) If so, upon what grounds?
(d) Have you ever been convicted of a crime?
(e) Has the Secretary of Labor ever instituted deportation proceedings against you?
(f) Have you had any hearings upon the question of whether you should or should not be deported?
(g) Have such hearings resulted in the Secretary of Labor entering an order for your deportation?
(h) Have you ever been arrested and transported to a port of entry for deportation?
(i) Have you ever brought any habeas corpus proceedings to prevent your deportation?
(j) Have such habeas corpus proceedings proceeded through the Courts and to the United States Supreme Court where your order of deportation has become final?
(k) Are you now exercising your freedom in this country by reason of having posted a bond?

We submit that no rule of law should be permitted to

stand that would require an underwriter to ask such embarrassing questions of all persons of foreign birth in order to prevent itself from being imposed upon by fraudulent concealment of material facts. We further submit that no honorable person of foreign birth should be subjected to embarrassment by having such obnoxious inquiry made of him.

5.

ALL REPUTABLE CITIZENS OF OUR NATION, WHETHER NATURAL BORN OR NATURALIZED, IN ORDER TO RECOVER UNDER A FIRE INSURANCE POLICY, UPON REQUEST AND DEMAND, ARE REQUIRED TO SUBMIT TO AN EXAMINATION UNDER OATH. CERTAINLY IT IS AGAINST THE PUBLIC POLICY OF THIS NATION TO EXCUSE A DENATURALIZED AND DEPORTED ALIEN, WHOSE CITIZENSHIP HAS BEEN CANCELLED ON ACCOUNT OF HIS LIFE OF CRIME AND MISCONDUCT AND WHO IS FOREVER FORBIDDEN FROM AGAIN ENTERING THIS NATION, FROM PERFORMING HIS CONTRACTUAL OBLIGATIONS, ESPECIALLY WHEN HE PROCURED THE CONTRACT BY CONCEALING, AND NOT REVEALING, HIS TRUE STATUS.

5 a.

SUCH A PROVISION IN A POLICY OF INSURANCE CONTRAVENES NEITHER STATUTORY ENACTMENT NOR PUBLIC POLICY AND IS VALID, AND MUST BE ENFORCED AS WRITTEN.

Claflin, et al. v. *Commonwealth Ins. Co.*, 110 U. S. 81, 28 L. Ed. 76.

Sims v. *Union Assurance Society,* 129 Fed. 804.
Gross v. *St. Paul F. & M. Ins. Co.,* 22 Fed. 74.
Hickman v. *London Assur. Corp.,* 184 Cal. 524, 195 Pac. 45.
Bergeron, et al. v. *Employers' Fire Ins. Co.,* 2 Pac. (2d) 453.
Cohen v. *Commercial Casualty Ins. Co.,* 277 Mass. 460, 178 N. E. 726 (Mass.).
Pearlstine v. *Westchester Fire Ins. Co.,* 70 S. C. 75, 49 S. E. 4.
Firemen's Fund Ins. Co. v. *Sims,* 115 Ga. 939, 42 S. E. 269.
North British & Mercantile Ins. Co. v. *Parnell* (Ga.), 185 S. E. 122.
2 Corpus Juris Secundum, p. 1357, Sec. 134.
Pierce v. *Globe & Rutgers Fire Ins. Co.,* 107 Wash. 501, 182 Pac. 586.
Knight, et al. v. *Firemen's Ins. Co.* (Mo. App.), 49 S. W. (2d) 682.

In the case of *Claflin, et al.* v. *Commonwealth Insurance Company,* 110 U. S. 81, 28 L. Ed. 76, the Supreme Court of the Nation, in speaking upon this provision, on pages 95 of 110 U. S. and 82 of 28 L. Ed., said:

> "The object of the provisions in the policies of insurance, requiring the assured to submit himself to an examination under oath, to be reduced to writing, was to enable the Company to possess itself of all knowledge, and all information as to other sources and means of knowledge, in regard to the facts, material to its rights, to enable it to decide upon its obligations, and to protect it against false claims."

5 b.

AN ASSURED CANNOT SUBSTITUTE AN AGENT IN LIEU OF HIMSELF TO SUBMIT TO SUCH AN EXAMINATION UNDER OATH.

This identical question was correctly decided by the court in the case of *Sims* v. *Union Assurance Society,* 129 Fed. 804. A receiver sought to substitute himself in place of the assured for an examination under oath. In holding that this was not in compliance with the policy provision, the court, on pages 807 and 808, said:

> "The right of the insurance company to have the insured himself appear for examination under oath is a substantial and important one. It is entirely different, in my opinion, from the right to make the preliminary proof of loss.
>
> • • •
>
> *"There is a provision in the policy that, where the expression 'insured' is used, it shall include the 'legal representatives' of the insured. I do not think a receiver, even when appointed, as in this case, for the particular purpose of collecting the insurance, can, in respect to the right of the company to an examination under oath, take the place of the insured.*
>
> *"Controlled by the provisions of the contract of insurance, and by the overwhelming weight of authority bearing thereon, I am compelled to hold that the failure of the insured to appear for examination under oath on the demand of the insurance company is a bar to a right of action in this case; and upon that ground judgment will be rendered in favor of the defendant."* (Emphasis ours.)

In a sister case of *Firemen's Fund Ins. Co.* v. *Sims,* 115 Ga. 939, 42 S. E. 269, the Supreme Court of Georgia, in refusing recovery because of the assured's failure to comply with this positive, valid provision of the policy, on page 271 of 42 S. E., said:

"We think the stipulation under consideration in this policy is a valid and binding one; that a failure or refusal to comply with its requirements, without any fault on the part of the insurer, will operate as a forfeiture of the policy; and that no recovery can be had thereon either by the insured or anyone claiming under or through him; and, as this would be so without regard to whether proofs of loss had been submitted and accepted or not (see Insurance Co. v. Schueller, 60 Ill. 465), *it is wholly unnecessary to determine whether the proofs of loss submitted in the present case were a sufficient compliance with the terms of the policy."* (Emphasis ours.)

(See authorities quoted under point D.)

5 c.

AN ASSURED CANNOT REFUSE TO COMPLY WITH HIS CONTRACTUAL OBLIGATIONS TO SUBMIT TO SUCH AN EXAMINATION BY CLAIMING HIS CONSTITUTIONAL IMMUNITY OR THAT HIS TESTIMONY MIGHT INCRIMINATE HIM.

In the case of *Hickman* v. *London Assur. Corporation,* 184 Cal. 524, 195 Pac. 45, the policy contained identical provisions to those in the policy in question and the same defense was raised as in this case. The assured had been indicted for burning the property for the loss of which he had sued to recover. He refused to submit to an examination under oath on constitutional grounds, claiming his constitutional immunity, but offered to submit to an examination should the criminal proceedings be dismissed, or should the defendant have them dismissed. The lower court held that he was justified in refusing to submit to an examination under oath on account of his constitutional immunity. The Supreme Court of California reversed the lower court and remanded, with directions to enter final

judgment for the defendants and, in doing so, on Pages 49 and 50 of 195 Pac., said:

> "The examination to which appellants demanded respondent should submit was an extrajudicial proceeding, not authorized by any constitutional or statutory provision, but purely by virtue of a contract between the parties. To bring a case within the constitutional immunity, it must appear that compulsion was sought under public process of some kind. This being so, respondent's refusal to undergo examination and produce his books and papers acquires no sanctity because he urged his constitutional right not to be compelled to be a witness against himself. The demand was made upon him by virtue of the stipulation in the contract and by the stipulation alone must his refusal be judged. The stipulation constituted a promissory warranty under which appellants had the right to demand compliance by respondent 'as often as required,' and the performance of such stipulation was a condition precedent to any right of action. No question was raised as to the sufficiency of the demand, or, aside from the claim of privilege, as to the reasonableness of the time and place designated in the demand. *The obligation to perform the warranty was as binding on respondent as his obligation to pay the premiums on the policies. The respondent did not fulfill his obligation, and stands here as having recovered a judgment upon an express contract one of the conditions of which he has failed to perform; in other words, when he commenced this suit he was without a cause of action.* (Emphasis ours.)
>
> • • • • •
>
> "It may be conceded that the position in which respondent found himself between February 12 and April 24 was one of difficulty, but it was a difficulty created by the contract he made. It has been said that—'Mere hardship or difficulty will not excuse a party from carrying out a contract; and, where one contracts to do any act which is possible, he is liable for a breach, even though circumstances arise, without

his fault, making it difficult, or even impossible, for him to perform.' (Citing cases.)

• • • • •

*"It follows that the conclusion of law that respondent's refusal to submit to examination and produce his books and papers on the ground of his constitutional immunity was 'justified, * * * proper, and right' is erroneous, and that upon the findings of fact as to his refusal judgment should have gone for the appellants.* (Emphasis ours.)

• • • • •

"The judgment is reversed, and the cause remanded, with directions to the court below to enter judgment in favor of the defendants."

5 d.

AN ASSURED CANNOT REFUSE TO COMPLY WITH HIS CONTRACTUAL OBLIGATION TO SUBMIT TO AN EXAMINATION UNDER OATH BECAUSE TO COMPLY THEREWITH MIGHT COMPEL HIM TO BE PROSECUTED ON CRIMINAL MATTERS.

In the case of *Pearlstine* v. *Westchester Fire Ins. Co.*, 70 S. C. 75, 49 S. E. 4, the assured failed to submit to an examination under oath. A suggestion had been made to have an agent submit to the examination under oath. The assured contended further that he was excused from submitting to an examination under oath, contending his absence from the State was forced on him, because a few weeks before the fire he had killed a man and he was at the time of the demand a fugitive from justice. The court, in holding that this did not constitute a defense, on Page 6 of 49 S. E., said:

"The agreement of the insured that he will 'submit to examinations under oath by any person named by this company, and subscribe the same,' stands upon an entirely different footing. The manifest purpose

of inserting this stipulation is to afford a method of detecting imposition and fraud. In demanding examination, the insurer indicates dissatisfaction with the formal *ex parte* statement or proof. In such case the insured has agreed his conscience may be searched by questions put to him face to face, where there is no opportunity for studied concealment. He, and not his agent, has an interest in the claim for the insurance, and therefore a motive for fraud. To hold that the person to whom an insurance policy is issued could substitute an agent for himself to undergo such an examination would be to disregard not only the letter, but the spirit of, the actual contract, and make another for the parties. We know of no authority which holds that an agent may be substituted for such an examination.

"It need hardly be said that, if circumstances arise without fault of the insured which make it practically impossible for him to appear for examination, from necessity he will be excused. In this case, however, the excuse offered in evidence on the part of the plaintiff for his failure to submit to the examination was that a few weeks before the fire he had killed a man, and was at the time of the demand and of the trial a fugitive from justice. The circuit judge refused to charge 'that the fact that plaintiff is a fugitive from justice, if such be the fact, would not excuse him from appearing and submitting to an examination, if demanded by defendant.' This was a manifest error. Mere unexplained absence would not be sufficient to excuse compliance with the contract. Certainly intentional and willful absence will not excuse. *Firemen's Fund Ins. Co.* v. *Sims* (Ga.), 42 S. E. 269; *Gross* v. *Ins. Co.* (C. C.), 22 Fed. 74; *Keener on Quasi Contracts,* 215; 9 Cyc. 639, 649. The plaintiff in this case fled to escape the demand of the state's law that he stand his trial for homicide. *It would be startling, indeed, for the law to excuse and sanction his flight and continued absence in defiance of its demands by holding he could have the benefit of a contract without performance of its obligations, because to perform*

his obligations would entail a submission to law, by undergoing a trial for the crime charged against him. By accepting such an excuse, the courts would not only sanction, but reward, flight from legal process.'' (Emphasis ours.)

5 e.

THE PROPER PLACE FOR HOLDING SUCH AN EXAMINATION UNDER OATH IS WITHIN THE COUNTY WHERE THE LOSS OCCURRED.

In the case of *Cohen* v. *Commercial Casualty Co.*, 277 Mass. 460, 178 N. E. 726, a policy of burglary insurance was involved. The policy was written in New York on property in New York and the loss occurred there. The assured, at the time the loss occurred, was commuting between New York and Boston, where he practiced law. Upon demand he refused to submit to an examination in New York. He later informed the insurance company that he and his family would submit to an examination in Boston. The insurance company insisted that the examination be held in New York, where the loss occurred and where the company's employees familiar with the claim were located. He never appeared for such examination. The court, in holding that the assured, the plaintiff, could not recover, on Page 727 of 178 N. E., said:

> *''Upon the facts in this case we are of opinion that the terms of the policy did not require the defendant to follow the insured into another state and examine him there, but that as a matter of law the defendant had a right to require that the insured submit himself for examination in the city of New York where the loss occurred and where the employees familiar with the claim were located; and that the insured violated an essential condition of the policy by refusing to submit to an examination in New York. In reaching this conclusion we have considered the contentions of the*

plaintiff that the law does not favor a forfeiture, that an insurance policy is to be construed most strongly against the insurance company, that its refusal to examine the insured in Boston was a waiver of the condition, and that a question of fact for the jury was presented by the record." (Emphasis ours.)

5 f.

THE MISSOURI CASES RELIED UPON BY RESPONDENTS AND FOLLOWED BY THE LOWER COURTS DO NOT SUSTAIN RESPONDENTS' POSITION.

In the case of *Phillips* v. *Protection Insurance Co.*, 14 Mo. 220, the court held that the demand was not reasonable. The demand was made for the assured to appear on the day it was served. The assured was in the process, in accordance with pre-arranged plans, of removing his family from St. Louis where cholera was raging. The insurance company made no further attempts or demands. Neither did it give the assured another opportunity to appear and be examined under oath.

In the case at bar, the petitioner made several demands upon the respondents for Roberto's production and submission to examination under oath (R. 44-52, incl.). The petitioner offered to examine the respondent, Roberto, at any time and any reasonable place within Cook County, Illinois (R. 49-52).

In the case of *Knight* v. *Firemen's Insurance Co.* (Mo. App.), 49 S. W. (2d) 682, relied upon by respondents, the assured, at the time of the service of the demand, was confined in jail; he was only given 45 minutes to secure the documents called for, obtain his freedom and appear at the named place. The demand was held unreasonable. This has absolutely no bearing on the case at bar.

A Missouri case directly in point under the facts in this

case is found in the case of *Fleisch* v. *Insurance Company of North America,* 58 Mo. App. 596, at 603 and 604.

Petitioners were certainly entitled to examine respondent, Roberto, and search his conscience upon the following questions:

(a) As to why the respondent Roberto claimed to be the owner of a one-half interest in the property when the title thereto stood of record in the name of his brother, Michael.

(b) As to the validity of the unrecorded deed purporting to transfer the title from his brother, Michael, to himself.

(c) As to why the respondent Roberto, at the time he procured the policy, failed to disclose that he, at that time, was under a valid order of deportation which had been contested in the courts, including the United States District Court for the Southern District of New York, the Circuit Court of Appeals for the Second Circuit, and this Court.

(d) As to why the respondent Roberto failed to disclose that, at the time he purchased and procured the policy in question, he was then exercising his freedom by reason of a cash bond that he had filed in the Second Circuit Court of Appeals.

6.

THE LOWER COURTS FAILED TO FOLLOW THE DECISIONS AND THE LAW OF THE STATE OF ILLINOIS TO THE EFFECT THAT THE KNOWLEDGE OF AN AGENT ACQUIRED IN THE TRANSACTION OF HIS OWN OR ANOTHER'S BUSINESS IS NOT THE KNOWLEDGE OF HIS PRINCIPAL UNLESS SUCH AGENT HAD SUCH KNOWLEDGE PRESENTLY IN MIND AT THE TIME OF ACTING FOR SUCH PRINCIPAL.

In the case of *O'Donnell* v. *Henley,* 327 Ill. 406, there was a suit for specific performance of contract to convey certain property. The contract showed that the seller was to receive certain security in return for the property but it incorrectly described a second mortgage as a contract. The seller did not know that the contract was a second mortgage though the seller's real estate agent knew this. On page 409 the court said as follows:

> "Before the knowledge of her agent can be imputed to her the knowledge must be that which the agent acquires while acting as such agent within the scope of his authority, or that which he may previously have acquired and which he then had in mind, or which he had acquired so recently as to reasonably warrant the assumption that he still retained it."

In the case of *The United Disposal and Recovery Co.* v. *The Industrial Commission, et al.,* 291 Ill. 480, the court in speaking upon this question, on page 485, said:

> "The law is well settled that when notice to an agent is relied upon to bind a corporation the nature of the agency must be such that the law will presume that the agent carried the notice to his principal, or it must be established as a fact that the agent did communicate to his principal such notice. (*Chicago, Burling-*

ton and Quincy Railroad Co. v. *Hammond,* 210 Ill. 187.) Notice to or knowledge of an agent while acting within the scope of his authority and in reference to a matter over which his authority extends is notice to or knowledge of the principal, but in order to be binding upon the principal the knowledge must be acquired while the agent is acting within the scope of his authority and in reference to a matter over which his authority extends. (4 Fletcher's Cyc. Corp. 2214.) The information imparted by Taylor to Franks did not bind the plaintiffs in error."

In the case of *Gammon* v. *Huse,* 100 Ill. 234, the court in speaking upon the question, on pages 240 and 241, said:

> "There is no proof that knowledge or notice of that feature of the contract was acquired by the agent in the transaction of the business to which his agency related, or that the same was, *at that time, really known to him, or that the same was present in the mind of the agent while performing his agency. The fact that he knew of this provision of the contract two years before the transaction, is not sufficient to charge his principal with notice of the same."* (Emphasis ours.)

In the case of *The People* v. *Gullborg,* 324 Ill. 538, the court in speaking upon the question, on page 539, said:

> "Notice to or knowledge of an agent while acting within the scope of his authority and in reference to a matter over which his authority extends is notice to or knowledge of the principal, but in order to be binding upon the principal the knowledge must be acquired while his agent is acting within the scope of his authority and in reference to a matter over which his authority extends. (*United Disposal Co.* v. *The Industrial Commission, et al.,* 291 Ill. 480.) Conceding that Adams received the notice of the hearing before the board of review, it was not binding upon appellant because it was not a matter over which Adams' authority extended. The objection was well taken and should have been sustained."

This appears to be the uniform holding of all the courts on this question.

Harrington v. *United States,* 78 U. S. 356 at 366 to 368 incl., 20 L. Ed. 167 at pages 170 and 171.

Lawson v. *Twin City Fire Ins. Co.,* 2 Fed. Supp. 171 at page 173.

Guaranty Trust Co. of New York v. *Koehler,* 195 Fed. 669, at pages 682 and 683.

Union National Bank v. *German Ins. Co.,* 71 Fed. 473 at page 476.

Mechem, in his Law of Agency, Second Edition, Vol. 2, page 1392, section 1809.

Bloomer v. *Cicero Mut. Fire Ins. Co.,* 183 Wis. 408, 198 N. W. 287.

Stennett v. *Pennsylvania Fire Ins. Co.,* 68 Ia. 674, 28 N. W. 12.

Drilling v. *New York Life Ins. Co.,* 234 N. Y. 234, 137 N. E. 314.

Shaffer v. *Milwaukee Mechanics Ins. Co.,* 17 Ind. App. 204, 46 N. E. 557.

St. Paul Fire & Marine Ins. Co. v. *Parsons,* Supreme Ct. of Minn., 47 Minn. 352, 50 N. W. 240.

First Natl. Bank of Nome v. *German Am. Ins. Co.,* 23 N. D. 139, 134 N. W. 873.

Neiman v. *Hawkeye Securities Fire Ins. Co.,* 205 Ia. 119, 217 N. W. 258.

McCormack v. *Security Mut. Life Ins. Co.,* 220 N. Y. 447, 116 N. E. 75.

Virginia Fire & Marine Ins. Co. v. *Lennon,* 140 Va. 766, 125 S. E. 801.

Haapa v. *Metropolitan Life Ins. Co.,* 150 Mich. 467, 114 N. W. 380.

Spivvy-Johnson Portrait Co. v. *Belt Automobile Indemnity Assn.,* 210 Ala. 681, 99 So. 80.

Girard Fire & Marine Ins. Co. v. *Gunn,* 221 Ala. 654, 130 So. 180.

Jackson v. *Mutual Ben. Life Ins. Co.*, 79 Minn. 43, 81 N. W. 545.

Southern Casualty Co. v. *Hughes*, 33 Ariz. 206, 263 Pac. 584.

Home Ins. Co. v. *North Little Rock Ice & Elec. Co.*, 86 Ark. 538, 111 S. W. 994.

Exchange Bank of Wilcox v. *Nebraska Underwriters Ins. Co. of Omaha*, 84 Neb. 110, 120 N. W. 1010.

The uniform holdings of the courts is well stated by Judge Cochran in the case of *Lawson* v. *Twin City Fire Insurance Co.*, 2 Fed. Supp. 171, wherein on page 173 he said:

> "But it cannot be said that the defendant had knowledge as to the true ownership of the property at the time it issued the policy. The claim that it then had such knowledge is based on the fact that Chesney, vice president of J. L. Manring & Co., defendant's agent, in the issuing of the policy, acquired such knowledge, when acting as an official of the People's Building & Loan Association, on making the loan and obtaining the mortgage to secure it on February 12, 1930, nearly two months previous. Defendant is not chargeable with such knowledge. It was not acquired in acting for the defendant but in acting for such association. *Union National Bank* v. *German Ins. Co.* (C. C. A.), 71 F. 473. *At least it was not so chargeable unless it was established that Chesney, when the policy was issued, had the knowledge so acquired then in mind. Foreman* v. *German Alliance Ins. Assn.*, 104 Va. 694, 52 S. E. 337, 3 L. R. A. (N. S.) 444, 113 Am. St. Rep. 1071.)" (Emphasis ours.)

We insist that the evidence is without dispute that Petitioner's issuing agent had no knowledge of any of the concealed facts and that if he had had, he would not have issued the policy (R. 168 to 171 incl.). The Court of Appeals, in its opinion, conceded that neither the petitioner

nor its agents and representatives had any knowledge of the deportation and habeas corpus proceedings (R. 341, 177 Fed. 2d, 811 at 815). It is without dispute that petitioner's supervising underwriter had no knowledge of these facts and that if he had had knowledge of these facts, he would have ordered the policy cancelled (R. 178-184 incl.); that petitioner's two assistant managers in charge of underwriting did not have knowledge of these facts and if they had had, they would not have accepted the business (R. 186, 187, 189). Petitioner therefore insists that under the law of the State of Illinois, the trial court should have directed a verdict in its favor. Certainly under the law of Illinois, petitioner was entitled to have the jury instructed according to the law of that state. This the trial court refused to do by refusing to give petitioner's requested Instruction 4 (R. 217), which was in words and figures as follows, to wit:

> "You are instructed that the knowledge of an insurance company's agents acquired in that transaction of his own or another's business is not binding on such insurance company unless you find and believe from the greater weight or preponderance of the evidence that at the time he acted for such insurance company he had presently in mind such knowledge."

It is clear that the lower courts failed to apply the law of Illinois on this question.

7.

PETITIONER, WHO WAS DENIED BY THE TRIAL COURT THE RIGHT TO READ STIPULATED FACTS AND EXHIBITS TO THE JURY IN THE REGULAR WAY, AS RESPONDENTS WERE PERMITTED TO DO, WAS DENIED A FAIR AND IMPARTIAL TRIAL BY JURY, AS GUARANTEED BY THE SEVENTH AMENDMENT TO THE CONSTITUTION, AND PETITIONER'S PROPERTY WAS TAKEN WITHOUT DUE PROCESS OF LAW, IN VIOLATION OF THE FIFTH AMENDMENT TO THE CONSTITUTION.

The parties hereto entered into two Stipulations of fact (R. 145-158 incl.). By entering into these Stipulations, a few days of the trial court's time was conserved. The trial court permitted Respondent to read all of the stipulated facts beneficial to Respondent (R. 145-153 incl.). The trial court nevertheless refused to permit Petitioner to read in the regular way the stipulated facts and exhibits beneficial to Petitioner on the grounds that there was no dispute about these facts (R. 152-158 incl.).

We say without fear of successful contradiction that the jury could not possibly have known what facts beneficial to Petitioner had or had not been stipulated (R. 128, 145-158 incl.).

We further say that because of the actions and rulings of the trial court, the jury could not have been prevented from reaching the conclusion that the stipulated facts (whatever in their minds they might have thought them to be), constituted no defense for petitioner.

It must therefore follow that Petitioner was denied a fair and impartial trial by jury and that petitioner's property was taken without due process of law.

Ballard v. *Hunter,* 204 U. S. 241, at 255, 256; 51 L. Ed. 461, at 472.

Hurtado v. *People of California,* 110 U. S. 516, at 530 to 532 incl., 28 L. Ed. 232, at 237.

St. Joseph Stock Yards Co. v. *United States,* 298 U. S. 38, at 51, 52; 80 L. Ed. 1033 at 1041, 1042.

Missouri Pacific Ry. Co. v. *Tucker,* 230 U. S. 340, at 348, 349; 57 L. Ed. 1507, at 1509, 1510.

Ex Parte Young, 209 U. S. 123, at 163, 164; 52 L. Ed. 714, at 730, 731.

Wadley Southern Ry. Co. v. *State of Georgia,* 235 U. S. 651 at 662, 663; 69 L. Ed. 405 at 412.

Bluefield Water Works & Improvement Co. v. *Public Service Commission of W. Va.,* 262 U. S. 679 at 690; 67 L. Ed. 1176 at 1181, 1182.

Southern Iowa Electric Co. v. *City of Chariton,* 255 U. S. 539 at 541, 542; 65 L. Ed. 764 at 775.

Norfolk & Western Ry. Co. v. *Conley, Atty. Gen. of the State of W. Va., et al.,* 236 U. S. 605 at 614; 59 L. Ed. 745 at 749, 750.

Railroad Retirement Board v. *Alton R. R. Co.,* 295 U. S. 330, at 357; 79 L. Ed. 1468, at 1480.

Denver Union Stock Yards Co. v. *United States,* 57 Fed. (2d) 735 at 739.

Certainly it must be said that the Court of Appeals, by approving and affirming the action of the District Court in refusing to permit petitioner to read to the jury in the usual, orderly and customary way the stipulated facts and exhibits beneficial to petitioner so that the jury would thoroughly understand what facts were admitted, departed and sanctioned such departure by the Trial Court from the accepted and usual course of judicial proceedings which calls for an exercise of this Court's power of supervision.

We submit that to leave such a method of procedure as was adopted by the Trial Court to stand approved, would

be to lay a foundation for a procedure by which the right of all of our citizens to a fair and impartial trial by jury, as has been recognized since the adoption of our Constitution, would be destroyed.

SUMMARY.

The right of a denaturalized and deported alien to sue in our courts to enforce a contract procured by fraudulent concealment and to enforce a contract under which he was unable to perform his own contractual obligation is presented for the first time to our knowledge to this court for determination. It is an important question not only involving the litigants in this case but all citizens of our nation as well as the rights of such denaturalized and deported aliens.

CONCLUSION.

In conclusion we submit that a Writ of Certiorari should be allowed as prayed for, the case reviewed by this court on its merits, and the judgment of the lower courts reversed.

Respectfully submitted,

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MAR 3 1950

CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1949.

No. 577

HARTFORD FIRE INSURANCE COMPANY,
a Corporation,
Petitioner,

vs.

DOMENICO ROBERTO and VINCENZO AMMIRATI,
Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1949.

No. 577

HARTFORD FIRE INSURANCE COMPANY,
a Corporation,
Petitioner,

vs.

DOMENICO ROBERTO and VINCENZO AMMIRATI,
Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

INTRODUCTION.

Petitioner has filed its Petition for Certiorari and Brief in Support thereof under one cover. References to that document will be indicated—"Pet. Br.," followed by page number. References to the printed transcript of record will be indicated—"Tr.," followed by page number.

This is an action upon a policy of fire insurance issued by the petitioner to the respondents.

The opinion of the Circuit Court of Appeals is reported in 177 F. 2d 811, and appears in the transcript of record at page 337, *et seq.*

No opinion was rendered by the trial court; but two memorandum opinions were filed by it on certain phases of the pleadings which opinions appear in the transcript at pages 75, *et seq.* and 92, *et seq.*

We are impelled to point out that the petitioner has intertwined statements and arguments in a manner which we believe to be somewhat irregular. We make this observation so that your Honors will the more readily apprehend the unusual format of the introductory portion of our brief.

Some of the statements contained in the petition are inaccurate and some wholly misleading. We shall point out such inaccurate and erroneous statements in the same sequence in which they occur in the petition.

Under the caption "Other Federal Statutes Involved" (Pet. Br., p. 2) counsel for petitioner advance their notions of the questions involved. Since such questions are specifically argued in a subsequent portion of petitioner's brief we defer here commenting thereon, but shall do so at an appropriate portion of this brief.

It is asserted (Pet. Br., p. 2) that "This case presents highly important Federal questions not heretofore decided by this court." What the petitioner really seeks is a re-reading and re-analysis of the entire evidence with the expectation that this Court will disagree with the Court of Appeals which held that the evidence and applicable law sustain the verdict of the jury and the judgment entered thereon. It is not the purpose of a certiorari to review such evidentiary disputes of no public importance.

The petition alleges that a writ of certiorari should be granted in order to correct a miscarriage of justice and remove a harmful precedent. Both grounds are based upon certain misconceptions of fact and law. These misconceptions will be considered in the order of their appearance in the petition.

This case is not one of "Peculiar Gravity" nor can it be said to be one of "General Importance", however important it may be to the petitioner herein, and certainly no constitutional question is presented. If the feelings of the individual litigant were made the test in these insurance cases, nearly every decision of a Court of Appeals would have to be reviewed, for every litigant naturally thinks that his particular situation is one of peculiar gravity. Viewed objectively, however, the present claim by petitioner is not one of either sufficient gravity or importance as to call for a review by this Court as such a review is not needed to clarify the already well defined propositions of law which are involved.

As we understand the law of certiorari, the challenged opinion of the Circuit Court of Appeals must show on its face that it is so far at variance with established law that it should not be permitted to stand unrebuked. To determine this, the opinion alone of the Circuit Court of Appeals should be examined.

The statements made by petitioner appearing on pages 3 to 18, both inclusive, of its petition, improperly intertwined with argument on the law and the citation of authorities, require no comment or reply at this point in our brief since all such statements are argued *in extenso* in petitioner's brief to which we shall make reply, but we do desire to point out to the Court two erroneous statements made by petitioner which are not argued in its brief.

We perceive no reason for the reference to Ammirati's citizenship made by petitioner because no point is made on this score either in the petition or brief of petitioner. The reason for the cancellation of Ammerati's citizenship is found in the footnote to the opinion of the Court of Appeals (Tr. 340).

It is asserted that the instant case could not be tried between the time when Italy declared war on the United States and the signing of the Peace Treaty, and in support of that unwarranted statement there is cited *Ex Parte Colonna,* 314 U.S. 510. All that need be said with reference to this authority as it applies to the case at bar has been said by this Court in *Ex Parte Kawato,* 317 U. S. 69.

Under the caption "The Judgment of the District Court" (Pet. Br., p. 13) complaint is made that the verdict of the jury was augmented with interest at the rate of 5 per cent per annum, that being the legal interest rate upon policies of insurance as provided by the statutes of the State of Illinois, "even for those years when the case could not be tried under the decisions of this Court because both respondents were then alien enemies". Primarily it may be stated that when the verdict of the jury was augmented by interest no objection thereto was made by counsel for petitioner.

The order augmenting the verdict was entered May 24, 1948 (Tr. p. 293). Petitioner's motion for a judgment notwithstanding the verdict or in the alternative for a new trial was filed May 27, 1948 (Tr. p. 294). In that motion no objection was raised to the fact that the verdict of the jury was augmented by interest. In petitioner's Statement of Points on Appeal (Tr. p. 304) no point was raised that the trial Court improperly augmented the verdict.

Precedents for Denial of the Petition.

It is the established practice of this Court not to grant certiorari to review evidence. *United States* v. *Johnston,* 268 U. S. 220, 227; *The Arizona* v. *Anelich,* 298 U. S. 110, 117.

Findings of fact in which the lower courts have concurred will not be disturbed by this Court unless shown to be clearly erroneous. *Stuart* v. *Hayden*, 169 U. S. 1; *Texas & P. Ry. Co.* v. *Railroad Commission*, 232 U. S. 338; *Texas & N. O. R. Co.* v. *Brotherhood Ry. & S. S. Clerks*, 281 U. S. 548, 558; *Crowell* v. *Benson*, 285 U. S. 22, 65; *United States* v. *Commercial Credit Co.*, 286 U. S. 63, 67; *Continental Ill. Nat. B. & T. Co.* v. *C. R. I. & P. R. Co.*, 294 U. S. 648, 678; *Pick Mfg. Co.* v. *General Motors Corp.*, 299 U. S. 3, 4.

Every point made by the petitioner in its brief here has been carefully considered and fully answered in the opinion of the Circuit Court of Appeals. All of such points were again considered when its petition for a rehearing was denied by that Court (Tr. 366).

ARGUMENT.

Under the caption "Argument" petitioner has divided its brief into seven numbered divisions. We shall respond to those numbered divisions in the same sequence, with like numbering.

1.

We never asserted that the respondents had a "constitutional right" to sue in our courts. The opinion of the Circuit Court of Appeals does not so hold. We fail to perceive the reason why this pseudo issue is advanced by petitioner.

2.

We do not dissent from the statement that United States District Courts possess and have only that jurisdiction expressly bestowed upon them by the Congress. Again the Circuit Court of Appeals does not hold to the contrary. Just how that statement of law, if answered in the affirmative, aids petitioner is not made clear, nor do we perceive that an acquiescence in that proposition of law affords any basis for the issuance of the writ. None of the authorities cited under this subdivision of petitioner's brief can in any wise serve as a basis for the issuance of the writ sought.

3.

Respondents were not barred from maintaining and prosecuting their action against the petitioner by reason of the deportation of the respondent Roberto.

Counsel for petitioner by asserting their understanding of the intent of Congress in enacting the statute which is now known as Title 28, U.S.C.A., Sec. 132, reach the con-

clusion that the respondent Roberto had no right to institute and prosecute, jointly with the respondent Ammirati, an action against the petitioner in the United States District Court. In support of that astonishing statement no authority is cited, and, in fact, no authority can be found for that statement.

Reference is also made by the petitioner to Title 8, U.S.C.A., Sec. 41, and it is further asserted that in enacting this statute Congress only granted to aliens within the jurisdiction of the United States the right to sue to enforce contracts. As would be well expected counsel for petitioner cite no authority for this startling proposition of law. In other words, all the District Courts, the Courts of Appeal, aye, even this Court, are asserted to have in the past consistently and erroneously construed this statute and by such asserted erroneous construction afforded non-resident aliens the right to sue in our Federal courts. If that proposition of law were not seriously advanced we would not deign to answer it. Granting good faith in advancing it, we point out to your Honors that in *Ex parte Kawato,* 317 U. S. 69, this Court stated (p. 74) "Even if petitioner were a non-resident enemy alien it might be more appropriate to release the amount of his claim to the alien property custodian than to the claimants."

In *Birge-Forbes Co.* v. *Heye,* 251 U. S. 317, Heye, a cotton broker in Bremen, instituted suit against Birge-Forbes Co., a cotton exporter in Texas, to recover sums that Heye paid for its account. Heye recovered a judgment, which was affirmed, with a modification as to payment, by the Circuit Court of Appeals. After the case had been taken to the Circuit Court of Appeals a motion was made to dismiss or suspend the suit on the ground that Heye had become an alien enemy by reason of the declaration

of war between Germany and the United States. The Circuit Court of Appeals affirmed the judgment with the modification that it should be paid to the Clerk of the trial court and by him turned over to the Alien Property Custodian. All that need be said with reference to this authority as it applies to the case at bar is stated in the first full paragraph on page 323 of the opinion in which this Court speaking through the much revered Mr. Justice Holmes held that a non-resident enemy alien could maintain and prosecute to judgment suit in our Federal courts.

We are further fortified in our position that Roberto could jointly with the respondent Ammirati maintain their action in a Federal court by the decision of the Circuit Court of Appeals in *Petition of Bernheimer,* 130 F. 2d 396. In that authority the petitioners came from the German Reich and lawfully entered the United States and registered as required by law. Both petitioners were injured in an automobile accident for which they instituted suit in the District Court of the United States. Because the District Court would not order the case placed on the trial list and because the order was not one from which an appeal could be taken, the petitioners filed application for a rule to show cause why a peremptory writ of *mandamus* should not issue to place the case on the trial list. The Circuit Court of Appeals ordered the writ to issue and in doing so, insofar as the opinion has application to the case at bar, expressed itself as follows (p. 397):

> "It is not even the case that a suit may not be prosecuted on behalf of an enemy subject even though resident in enemy or neutral territory. Such suits are occasionally allowed to proceed to judgment where adequate measures may be taken to prevent advantage to the enemy. See *Birge-Forbes*

Co. v. *Heye, supra; Propper* v. *Buck,* 178 Misc. 76, 33 N.Y.S. 2d 11, affirmed 263 App. Div. 948, 34 N.Y.S. 2d 134; *Weiditschka* v. *Supreme Tent of Knights of Maccabees of the World,* 188 Iowa 183, 170 N.W. 300, 175 N.W. 835; *Geiringer* v. *Swiss Bank Corp.* (1940) 1 All Eng. R. 406; and *White Engineering Corp.* v. *Canadian Car and Foundry Co.* (1940) 43 Quebec Pr. 419."

We respectfully assert that these two opinion dispose of the contention here advanced by the petitioner.

Counsel for petitioner lose sight of the fact that the Federal Statutes (Title 28, U.S.C.A., Section 41) upon which the right of an alien to bring suit in our courts is predicated, make no distinction between a non-resident alien and a resident alien in so far as his right to sue is concerned. The statute provides that the District Court has jurisdiction of civil suits where the jurisdictional amount is involved and where the action is between citizens of a state and "foreign states, citizens or subjects". It does not make it a condition to sue that the foreign citizen or subject be a resident. The bold and sweeping statements of counsel for petitioner as to the intent or lack of intent of Congress in passing Title 28, U.S.C.A. Sec. 41 are not persuasive or relevant in the face of the plain words, above quoted, which permit a foreign citizen or subject to bring suit against a citizen of the United States. In attempting to construe the above enactment the first and most important rule is to give the language used its plain and ordinary meaning. If we do this we reach the conclusion that an alien, whether he be resident or non-resident, may bring action against a citizen of a state of the United States if the jurisdictional amount is involved. In short the respondent Roberto comes within the plain description of the persons who may bring such an action. Throughout the petition and

brief of petitioner is a running comment which stigmatizes Roberto as a "denaturalized and deported alien". In so far as this case is concerned Roberto is a non-resident alien.

Diligent search has failed to reveal any decision of this Court, or of any of the inferior Federal Courts, which places a "denaturalized and deported alien" in a differ-category from any non-resident alien. Counsel for petitioner have furnished this court with no authority to sustain this distinction.

Counsel for petitioner make this further point that the respondent Roberto was illegally in this country when the policy of insurance in question was issued and that therefore he had no right to bring this action. The facts in this respect are well stated in the opinion of the Court of Appeals (Opinion, Tr. 337 at 339) from which it is clear that the respondent Roberto was legally in the United States when petitioner issued the policy of insurance here sued upon.

For the proposition of law that an alien who is illegally here may not institute suit in our courts, petitioner relies upon *Coules* v. *Pharris,* 212 Wisc. 558, 250 N.W. 404. A reading of that authority will disclose that the facts there before the court and the factual issues in the instant case are in no wise comparable. In its opinion the Circuit Court of Appeals considered this authority and held it no bar to the instant case.

The leading state court decision on this subject is *Janusis* v. *Long,* 284 Mass. 403, 188 N.E. 228. The Massachusetts Supreme Court in a scholarly and pursuasive opinion reached exactly the opposite conclusion to that reached by the Wisconsin court. It is true that in the Massachusetts case the cause of action arose

from personal injuries sustained by the plaintiff. The Massachusetts court in its opinion made no distinction between the right of a resident alien to recover in a tort case and his right to recover in a contract case. Furthermore, it is to be borne in mind that in the Massachusetts case the plaintiff was permitted to recover even though he had offended against the laws of the country in illegally entering.

The New York court had before it the same question as was presented to the Massachusetts and Wisconsin courts in the case of *Feldman* v. *Murray*, 12 N.Y.S. 2d 533. There the court considered both the Wisconsin and Massachusetts decisions. Its decision put New York on record as following the Massachusetts rule, and it also referred to the case of *Martinez* v. *Fox Valley Bus Lines, Inc.*, 17 F. Supp. 576, in which the same conclusion was reached as was reached in the Massachusetts case.

In the case of *Arteaga* v. *Allen*, 99 F. 2d 509, the court reached the same conclusion as was reached by the Massachusetts, New York and the United States District Court in the cases hereinabove cited.

All of these authorities were commented on by the Circuit Court of Appeals in its opinion in this case.

4.

There was no fraudulent concealment by respondents of facts relevant and material to the risk assumed by the petitioner.

We have no quarrel with the definition of moral hazard recited in petitioner's brief. However, we are at a loss to determine its applicability to the case at bar. There is not a single word in the record before this Court upon which there can be predicated any charge or foundation that the prior acts and doings of Roberto in any manner

increased the hazard or risk of the defendant. No witness testified that respondents, or either of them, could or would or did profit by the destruction of the insured premises. There was no testimony that the property was over-insured, or that the loss sustained by the respondents did not far exceed the total amount of insurance. The contention of moral hazard advanced by the petitioner loses all of its vitality when consideration is given to the stipulation of the petitioner as to the damage to the property in question (Tr. 146).

The petitioner claims that the respondent Roberto fraudulently concealed from it the fact that he had been indicted, convicted, incarcerated and deported. Even assuming that Roberto concealed from the petitioner such facts, nevertheless, there is not a single word in the record to show that such concealment in any wise, to any extent whatsoever, increased the hazard or risk of the petitioner which it assumed under its policy of insurance.

Where the insurer fails to question the insured upon the issuance of the policy of insurance, as in this case, the latter cannot be held to have been guilty of such concealment as will avoid the policy unless he withholds facts which he knows, or as a reasonable man should know, to be material to the risk, and unless he also perpetrates such concealment intentionally or fraudulently or with the affirmative intent to procure insurance which could not be obtained after a disclosure of such facts.

It is not shown by the evidence, and counsel for petitioner have not pointed it out in their brief, how it would have been even remotely possible for Roberto to have concealed his past record. It is somewhat a tax on credulity to assume that Roberto was not well known to all persons in the small city of Chicago Heights, having a population of approximately 25,000 persons (Tr. 174),

and certainly he was well known to persons with whom he had business relations, and particularly including the procuring of insurance.

The evidence is clear that petitioner's general agent, or, as it is usually termed, the writing agent, William H. Donovan, Senior, knew the respondents well for many years prior to the issuance of the policy sued upon, and that he had previously insured property of these respondents. William H. Donovan, Senior, did not testify and there is absolutely no evidence in the record as to what he did not know. Counsel for petitioner term William H. Donovan, Jr., who did testify, petitioner's agent, but in fact Donovan, Jr., who was at that time 24 years old, simply worked for his father and was not the agent for petitioner. It is also clear that before the issuance of the policy in question the activities of Roberto which led to his deportation were front page news in the little community of Chicago Heights in which the respondents and Donovan, Senior, lived. In the face of all this when the respondents desired insurance on the property in question they still went to Donovan, Senior, for that coverage. How under these circumstances can the petitioner seriously advance to this Court the preposterous claim that the respondents are guilty of fraudulent concealment of material facts?

Whether petitioner would have issued the policy of insurance had it knowledge of the cancellation of respondents' citizenship papers, and the arrest, conviction and incarceration of Roberto and the subsequent deportation proceedings was one of the questions submitted to the jury. There is no evidence that the petitioner's writing agent Donovan, Senior, would not have written and issued the policy had he lacked knowledge of such facts. Donovan, Senior, did not so testify.

We have carefully read each decision cited by the petitioner in support of the proposition here advanced by it. Each decision is readily distinguishable from the case at bar by particular facts not comparable to the facts in the instant case.

In *Queen Ins. Co.* v. *Cummins,* 267 S. W. 144, cited by petitioner, the sole question was whether the failure of the insured to inform the insurance company of certain encumbrances against the mortgaged property avoided the policy. An answer interposed by the insurance company pleaded such defense and a demurrer to that answer was sustained and an appeal taken. This authority has no application to the factual situation in the case at bar.

In *Fireman's Fund Ins. Co.* v. *McGreevy,* 118 Fed. 415, also cited by petitioner, the insured was a local agent for the defendant insurance company. He had been given a book of instructions issued by that company. There were instructions in the book which plainly indicated that had the agent given the insurance company full information it would not have issued the policy. The agent was acting in a dual capacity, being both assured and agent, and under the well recognized rule of law there was a presumption that the agent would conceal from his principal any facts which might be detrimental to his own interest.

Counsel for petitioner in discussing this authority say (Pet. Br., p. 30): "No questions were asked and no representations made by the assured to procure the insurance." This statement is misleading. No questions were asked because the assured was the agent of the company. He knew all the facts and as such agent knew that the company would not have written the policy had he, as such agent, given the company all the information in his possession. Plainly this authority has no application to the case at bar.

The case of *Sebring* v. *Fidelity-Phenix Fire Ins. Co.*, 255 N. Y. 382, 174 N. E. 761, also cited by petitioner, if it has any application to the case at bar, is one favorable to respondents. The petitioner quotes an excerpt from the opinion in this case. If counsel for petitioner had enlarged their quotation they would have disclosed, we believe, that this decision does not support their contentions. We remedy the deficiency, and quote further from that opinion (p. 762):

> "Duty to disclose a material fact manifestly is not the same thing as materiality itself. Concealment is the designed and intentional withholding of any fact material to the risk which the assured in honesty and good faith ought to communicate to the underwriter. *Daniels* v. *Hudson River Fire Ins. Co.*, 12 Cush. (Mass.) 416, 425, 59 Am. Dec. 192. A fact may be material, yet, under certain circumstances, courts have held that no obligation rests upon the assured voluntarily to reveal it. * * * Unless nondisclosure of a fact, concerning which he has not been asked, be fraudulent, the applicant's omission to state it will not avoid a fire or life policy. (Citing authorities.) If fraudulent intent be present, of course, the opposite result will follow. In order to constitute fraud, there must be suppression in bad faith with intent to mislead the insurer."

Counsel for petitioner next cite *Stipcich* v. *Metropolitan Life Ins. Co.*, 277 U. S. 311, which was an action on a policy of life insurance. The rule of law applicable in actions on life insurance policies is not the same as the rule applied to fire insurance policies. Where a life insurance policy is issued an application is required and answers in writing are made. The applicant knows exactly what information the company desires and must truthfully and in good faith furnish the requested information.

N. Y. Life Ins. Co. v. *Gay*, 36 F. 2d 634, next cited by petitioner, is similar to the *Stipcich* v. *Metropolitan Life Ins. Co.* case just discussed.

Harrison State Bank v. *United States Fidelity & Guaranty Co.*, 94 Mont. 100, 22 Pac. 2d 1061, next cited by petitioner, is far removed factually from our case. In this authority the cashier of the bank, who was also the local agent of the insurance company, obtained the issuance of the policy of insurance, being one of burglary and robbery. The agent made no disclosure of his knowledge relative to a proposed robbery of the bank and the insurance company had no knowledge of such proposed robbery. His failure to make disclosure of this highly pertinent information was held to be fraudulent concealment.

4a.

Whether there was a fraudulent concealment of material facts was a question of fact for the jury.

It is stated by counsel for petitioner that "no underwriter of ordinary ability or for that matter, any person with ordinary intelligence, exercising ordinary care and caution, would write a contract of indemnity to protect such a denaturalized and deported alien against loss to his property." Strange as it may seem to counsel for petitioner there did exist two underwriters of that category who did issue policies of insurance to respondents as will readily appear from the complaint herein (Tr. 2) where the two underwriters lacking ordinary ability and ordinary intelligence were the other two insurance companies who issued policies of fire insurance upon this same property of the respondents.

It is urged by the petitioner that the respondent Roberto having experienced the different proceedings instituted against him must have known that if such facts were

known he could not procure insurance. A simple and terse answer is that the jury having all the facts before it disagreed with counsel for petitioner, as did also the trial judge when he entered judgment upon the verdict and denied petitioner's motion for a new trial, and as did also the Circuit Court of Appeals.

That the question of fraudulent concealment of material facts was submitted to the jury for its determination is beyond controversy, since it appears from the record that the petitioner requested, and the court gave, a specific instruction to the jury upon such issue. Petitioner's instruction 1 (Tr. 220) unequivocally embodied that issue.

That the trial court properly submitted that issue to the jury has been the immutable law certainly since the time of the great Chief Justice John Marshall. Chief Justice Marshall pronounced the doctrine in *Maryland Ins. Co.* v. *Rugan's Administrator,* 6 Cranch 426, in which case he stated (p. 427):

> "It is well settled that the operation of any concealment on the policy depends on its materiality to the risk, and this court has decided that this materiality is a subject for the consideration of a jury."

Chief Justice Marshall reiterated this proposition of law in *Livingston* v. *The Maryland Ins. Co.,* 6 Cranch 274, where he stated (p. 279) that "the effect of the misrepresentation or concealment on the policy depends on its materiality to the risk. This must be decided by a jury under the direction of a court."

Another Chief Justice of this Court reached the same conclusion when Chief Justice Taft at the time he graced the Circuit Court of Appeals, Sixth Circuit, in speaking for the court in *Penn Mut. Life Ins. Co.* v. *Mechanics' Savings B. & T. Co.,* 72 Fed. 413, said (p. 430) that "the question whether a fact is material to the risk is always a

question for the jury." Then follows a learned discourse on the subject by Chief Justice Taft, in which he adverted to and discussed many authorities on the subject, including a reference to the opinion of Chief Justice Marshall in *Maryland Ins. Co.* v. *Rugan's Administrator,* 6 Cranch 426, *supra.*

The identical proposition of law when it again came before the Federal courts was again similarly determined as being a question of fact for the jury.

Camden Fire Ins. Assn. v. *Penick,* 2 F. 2d 964, 965.

Atlas Assur. Co. v. *Hurst,* 11 F. 2d 250, 253.

National Fire Ins. Co. v. *Renier,* 22 F. 2d 671, 672.

4b.

No question of public policy is herein involved.

We harbor the belief that no response is needed to the almost inane statement made by counsel for petitioner under this subdivision of petitioner's brief. The statement that no underwriter should be required to ask of an applicant for fire insurance the questions outlined is completely answered in *Granger* v. *Providence-Washington Ins. Co.,* 200 Fed. 730. In that case the libellants had chartered a schooner to carry certain timber. They had insured the cargo with the defendant. There was a discrepancy between the amount of lumber recited in the bill of lading and that recited in the policy of insurance and this discrepancy was explained as being a practice in that trade. In the course of her voyage the vessel encountered heavy weather and jettisoned some thousands of feet of lumber bringing the rest of the cargo in safety to destination. The libellants brought suit upon the policy upon the loss of the jettisoned lumber. The trial court dis-

missed the libel on the ground that the libellants admitted that it had been their practice to understate the footage of dressed lumber for freight purposes. The trial court held that this practice was a fact material to the risk which the libellants were obligated to disclose.

In reversing the decree of the trial court the Circuit Court of Appeals expressed itself in the following language (p. 733):

> "It seems to us to be going quite too far to hold that underwriters may be discharged of their liability for a claim in every respect regular, because they were not informed by the insured that he had often been guilty of fraudulent practices, or was in the particular case guilty of a fraud upon the owners of the vessel, which in no respect affected the actual risk. Some underwriters might be unwilling to insure the property of a dishonest man, or of a liar, or of a drunkard; but it would be unreasonable to relieve an underwriter of liability for a perfectly regular claim on the ground that the insured should have informed him that he was dishonest, untruthful or intemperate."

This decision, we respectfully assert is uniquely applicable to the case at bar. The language in the above excerpt well expresses the situation in the case at bar.

In *Transcontinental Ins. Co.* v. *Minning,* 135 F. 2d 479, an action had been instituted on a fire insurance policy. In that case, as in the case at bar, the insurance company contended that the policy was void because of material concealment by the assured. The court in affirming the judgment for plaintiff expressed itself in the following language (p. 481):

> "Concealment of matter which can in no way increase the risk does not avoid the policy. 22 Ohio Jur. 565; *Lexington Fire, Life & Marine Ins. Co.* v. *Paver,* 16 Ohio 324. * * * All that is required of him is that he shall not misrepresent, or designedly conceal any such facts, and that he answer, in good

faith, all questions asked him by the insurer, unless the fact not communicated is one of unusual peril to the property, and could not, with reasonable diligence, be discovered by the insurer, or anticipated as a foundation for specific inquiry."

A case very analogous to the case at bar is *Stecker* v. *American Home Fire Assur. Co.,* 299 N. Y. 1, where plaintiff, a fur merchant, procured from the defendant a so-called "salesman's floater policy" insuring plaintiff against loss or damage to his furs while being transported around the country for sale to plaintiff's customers. During the term of the policy, some furs were reported by insurer to have been stolen from him, and he then brought suit on the policy for the amount of his loss. As one of several defenses and counterclaims, defendant pleaded that plaintiff had concealed from it the fact, claimed by defendant to be material to the risk, that plaintiff, six years before purchasing this policy, had been convicted in a Federal Court of the crime of concealing assets from his trustee in bankruptcy.

The counterclaim, which prayed for the cancellation of the policy as void from its inception, was the subject of a separate trial before a judge without a jury. The trial court, on conflicting evidence, found as a fact that the insured had disclosed his criminal record to defendant, and, accordingly, entered an order dismissing the counterclaim on the merits.

The defendant appealed and that court, reversing the order below on the facts and the law, took a different view of the fact principally in controversy. Its finding was that there had been no disclosure at all to defendant by plaintiff of the 1938 conviction. On further appeal, the Court of Appeals, being the highest court in the State of New York, held that the weight of the evidence supported

the factual determination of the intermediate reviewing court, that is, that no disclosure was made.

In its opinion the court stated that plaintiff in taking out the insurance was asked no questions, signed no application, and furnished no information on the subject. The court said that if the so-called "ordinary rule" as to concealments by applicants for insurance be applied, then plaintiff's failure voluntarily to come forward with the story of his past would not void the policy. Such was the holding of the trial court and the intermediate reviewing court, both courts citing the leading case of *Sebring* v. *Fidelity Phenix Fire Ins. Co.*, 255 N. Y. 382, heretofore adverted to.

The court then pointed out the distinction between the "marine rule" and the "ordinary rule," discussed a number of authorities, and concluded that the "ordinary rule" as to non-disclosure is the one to apply in respect to policies like the one in suit, and that, as to such policies, if the insurer makes no inquiry, and the insured no representation, as to the fact in question, then the concealment, short of actual fraud, in respect to such a fact, does not void the policy.

5.

Public policy is not involved upon the question of excusing the respondent Roberto for appearing for examination under oath.

We are at a loss to perceive how the question of public policy arises in the case at bar. As we view it the public policy question is a figment of the imagination of counsel for petitioner. We are fortified in this conclusion by the trial court and by the Circuit Court of Appeals. Counsel for petitioner have not seen fit to argue the proposition and we believe that we may properly assume that lack of argument stems from lack of justification.

5a.

Respondent Domenico Roberto was excused from appearing for examination under oath in that he could not lawfully enter this country at the time the request for examination was made.

We assent to the proposition that a provision for examination under oath of an insured in a policy of fire insurance does not contravene any statutory enactment nor public policy, and is valid. Its enforcement depends upon a variety of factors; and we respectfully assert that in the case at bar a good and valid excuse existed for the non-appearance of the respondent Roberto.

The proposition here advanced by petitioner was submitted to the trial judge upon respondents' motion to strike paragraph 15 of Division II of the answer of the petitioner. This portion of the petitioner's answer appears on page 37 of the transcript, the motion to strike appears on page 41 of the transcript, and the opinion of the trial judge appears on page 75 of the transcript.

The trial judge rendered his memorandum opinion (Tr. p. 75) in which he sustained respondents' motion to strike and held that the respondent Roberto was excused from appearing for examination under the particular facts obtaining in the case at bar.

The authorities cited by counsel for petitioner present a correct proposition of law when properly applied to the facts as revealed in those cases; but there is much dissimilarity in the facts involved in those cases and in the facts in the case at bar, and we here purpose to point out to your Honors that no one of the authorities cited by the petitioner is applicable here.

The provision in the policy in respect to examination under oath is inserted for the benefit of the insurer, and

it must be given a reasonable interpretation and the demand for such examination must be reasonable and the time and place fixed in such demand for examination must be reasonable.

One of the authorities cited by petitioner is *Pearlstine* v. *Westchester Fire Ins. Co.*, 70 S. C. 75, 49 S. E. 4, where the court said (p. 6 of 49 S. E.):

> "It need hardly be said that if circumstances arising without fault of the insured which make it practically impossible for him to appear for examination, from necessity he will be excused."

The circumstances obtaining in the case at bar are precisely the situation recited in this authority in that it was impossible for Roberto to appear for examination, and so from necessity he was excused from doing so.

The opinion by this court in *Claflin* v. *Commonwealth Ins. Co.*, 110 U. S. 81, cited by petitioner, is not applicable to the facts in the case at bar.

It is to be pointed out that the respondent Ammirati appeared for examination under oath and was examined with the result that the petitioner was not denied knowledge and information "in regard to the facts, material to its rights, to enable it to decide upon its obligations, and to protect it against false claims." It is not asserted by petitioner that a fire did not occur, that there was not damage to the property of the respondents, and that it was not given full information in regard to that fire loss. Stripped of all needless and excess verbiage the whole case is resolved into the simple proposition that the petitioner is seeking to evade the payment of a lawful and just claim upon the inexcusable ground that because Roberto was incarcerated for a crime for which he paid the penalty, and was deported so that he was physically

unable to appear at the examination under oath in this country, petitioner should be relieved of its obligation and thus have a wind-fall. It is further to be pointed out to your Honors that if in good faith the petitioner desired to examine Roberto it could have done so, although, it is true, such examination of necessity would have occurred in Italy. Such opportunity was afforded the petitioner when the trial judge rendered his memorandum opinion upon this phase of this litigation (Tr. 75, 80).

The conclusion reached by the trial judge was approved by the Circuit Court of Appeals, and in doing so the latter embodied the conclusion and language of the trial judge upon this particular question (Opinion, Tr. 337, at 342).

5b.

Under this division of their brief petitioner urges that an assured cannot substitute an agent in lieu of himself to submit to an examination under oath. We never asserted a contrary position. The two authorities cited by petitioner under this division of its brief have no application to the facts in the case at bar as is obvious even from a reading of the excerpts taken from those two opinions.

5c. and 5d.

These two subdivisions of petitioner's brief can well be joined and we trust that such action on our part will meet with the approval of your Honors.

We respectfully urge that these two propositions of law require no answer because we never maintained that the respondent Roberto could properly refuse to appear for examination under oath by claiming his constitutional immunity or that his testimony might incriminate him.

We respectfully urge that counsel for petitioner are attempting to becloud this issue. No such point was advanced by petitioner in its motion for a new trial (Tr. 294) nor was such point advanced by petitioner in its Statement of Points on Appeal (Tr. 304).

The case of *Hickman* v. *London Assur. Corp.*, 184 Calif. 524, 195 Pac. 45, is not relevant to the case at bar in that in that case the assured refused to submit to an examination under oath on constitutional grounds. No comparable situation exists in the case at bar.

We have heretofore discussed the case of *Pearlstine* v. *Westchester Fire Ins. Co.*, 70 S. C. 75, 49 S. E. 4, and we therefore do not again discuss that authority.

We never did assert, and we do not now assert, that the respondent Roberto failed to appear for examination under oath in the exercise of his own choice or volition, but rather that his failure to appear was entirely involuntary because it was physically impossible for him to enter this country.

5e.

We admit that the proper place for holding an examination under oath is within the county where the loss occurs.

5f.

It is asserted by counsel for petitioner that the two Missouri cases relied upon by the respondents and followed by the lower courts do not sustain the latter's position. However, it is not asserted that the other authorities relied upon do not support the position of the respondents. These Missouri cases are discussed next following.

In *Phillips* v. *Protection Ins. Co.*, 14 Mo. 220, the insurance company made a demand upon the insured at his place of business that he submit himself to examination on the day of the demand. The fire had occurred in St. Louis, where the insured resided and had his place of business. At that time a cholera epidemic was raging in St. Louis. The insured had previously made arrangements to remove his family from St. Louis on the day set for the examination. The insured disregarded the notice and in accordance with his plans did remove his family from St. Louis to a distant city on the very day set for the examination, and did not return to St. Louis for several months. As stated by the court "the company put themselves on the refusal of the plaintiff to submit to an examination under oath on the day fixed as a complete bar to the claim." In respect to the insurance company's defense that the insured failed to submit himself to examination pursuant to the demand, the court said (p. 234):

> "We cannot suppose that it was encumbent upon the plaintiff to obey the requirements of the company at an unreasonable time, and under every condition or circumstance."

From this point on the above stated principle may be found reiterated in the decisions on this question. In *Knight* v. *Firemen's Ins. Co.*, 49 S. W. 2d 682, the insurance company claimed error on the part of the trial court in giving the following declaration of law at the plaintiff's request (p. 684):

> "The Court declares the law to be that if the Court finds from the evidence that the property destroyed was located in Holden, Missouri, and that Guy Knight was notified to appear at Clinton, Missouri, the failure of Guy Knight to appear and be examined at Clinton, Missouri, if he did so fail, constitutes no defense to this action."

The court there said (p. 686):

> "The notice was served on the insured while he was confined in jail and the defendant knew it; and it also knew that he could not respond to the notice except by the grace of the sheriff. Insured was given forty-five minutes in which to secure the documents called for, obtain his freedom, and appear at the place named in the notice. The demand was unreasonable."

We respectfully assert that another rule of law prevails which holds that if circumstances beyond the control of the insured arise which make it impossible for him to appear for examination under oath, at the time and place specified, his failure so to appear will be excused.

This rule of law is well exemplified in *Pearlstine* v. *Westchester Fire Ins. Co.*, 70 S. C. 75, 49 S. E. 4, where the court said (p. 6 of 49 S. E.):

> "It need hardly be said that if circumstances arise without fault of the insured which make it practically impossible for him to appear for examination, from necessity he will be excused."

Counsel for defendant also rely on the *Pearlstine* case, but we respectfully urge that it supports our position in that we maintain that Roberto failed to appear for the examination under oath not in the exercise of his own free choice or volition, but rather that his failure was entirely involuntary because it was physically impossible for him to enter into this country.

In the case of *Pierce* v. *Globe & Rutgers Fire Ins. Co.*, 182 Pac. 586 (Wash.), shortly after the fire occurred the insurance company served a written notice upon the insured that he appear at a certain time and place in the City of Seattle, Washington, for examination under oath as provided in the policy of insurance. The insured left his home in Pacific City, where the fire occurred, and pro-

ceeded to Seattle in order to attend the examination under oath, and on the way visited the office of the prosecuting attorney in response to the prosecutor's request. After the insured arrived at the office of the prosecuting attorney, he was questioned at some length touching the fire and was thereupon arrested under a warrant which had theretofore been issued. At the time set for the examination the insured was then confined in jail. Of course, it was impossible for the insured to attend the examination, and he did not appear at the time and place set for the same. No further demand was made upon the insured by the insurance company that he submit to examination. The insured was released from jail upon bail, a few days after his arrest, and he thereafter made no further effort to present himself for examination at the place set in the said notice. In this case the court said (p. 587):

> "The trial court submitted to the jury the question of whether or not Lewis failed without reasonable cause to submit himself for examination, and the effect of the jury's verdict was that he did not so fail. We are of the opinion that under the circumstances it would not be decided as a matter of law that Lewis failed without reasonable cause to appear at Steele's office and submit to examination as demanded by the insurance company, and that the trial court did not err to the prejudice of the insurance company in leaving that question for the jury to decide. This conclusion finds support in what may be regarded the leading decision upon that subject, in *Phillips* v. *Protection Ins. Co.*, 14 Mo. 221."

It is asserted by petitioner that the case of *Fleisch* v. *Insurance Co. of N. A.*, 58 Mo. App. 596, is directly in point. A reading of that case will disclose that it has no bearing on the case at bar and that the factual issues in that case are wholly dissimilar to the facts in the case at bar.

6.

Petitioner failed to establish its affirmative defense of fraudulent concealment, and therefore the knowledge or lack of knowledge of petitioner's agent was not involved.

The primary obstacle to the position of petitioner is that it assumes that it established the affirmative defense of fraudulent concealment. We have no quarrel with the four decisions of the Supreme Court of Illinois cited by petitioner upon the particular facts involved in each of those cases. Their application to the case at bar is not apparent.

Petitioner charged the respondents with fraudulently concealing facts from petitioner's general agent, William H. Donovan, Senior, who, it is claimed, had he known such facts, would not have issued the policy in question; and it further asserted that had petitioner learned of such facts before the fire it would have directed cancellation of the policy. That such defense is an affirmative one we believe should hardly be disputed.

We respectfully assert that petitioner wholly failed to introduce evidence of any kind from which there could reasonably be drawn the conclusion that the respondents fraudulently concealed from petitioner's general agent pertinent and relevant facts. As important on the issue of whether the respondents intended to deceive petitioner in the procuring of the policy, it is not amiss to point out to the court, albeit a repetition, that petitioner's general agent, William H. Donovan, Senior, was not only acquainted with the respondents since 1923, that being the date when he took the acknowledgment of the plaintiffs on the agreement to purchase the very property in question (Plaintiffs' Ex. 158; Tr. 158), but that William H. Donovan, Senior, was well acquainted with the respondents in

a business sort of way, and prior to the issuance of the policy of insurance here in question had other insurance transactions with respondents (Tr. 175).

It is likewise significant, we respectfully assert, that the petitioner failed to produce the one witness who could have affirmatively established the defense of fraudulent concealment, if such defense existed; it failed to produce William H. Donovan, Senior. Nor did it explain or give any reason why it failed to produce him. We believe that it is a reasonable and fair deduction to say that such failure arose solely and because William H. Donovan, Senior, would truthfully have testified that there was no concealment from him since he knew all of the facts concerning respondents which the petitioner now says were fraudulently concealed from him and thereby from it. The failure of petitioner to produce William H. Donovan, Senior, or give some reason for the failure to produce him, was the subject of comment by the Circuit Court of Appeals (Opinion, Tr. 337, 339).

In *Wharton* v. *Aetna Life Ins. Co.*, 48 F. 2d 37, that court held (p. 43) that the burden of proving that the plaintiff was chargeable with false representations was on the defendant.

In *Mercury Ins. Co.* v. *Miles,* 126 Pac. 74, 76 (Okla.) the insurance company had issued a policy of fire insurance upon an oral application therefor. The insurance company denied liability on the ground of concealment of an existing mortgage on the insured property. The Supreme Court of Oklahoma stated that this was an affirmative defense and the burden was on the insurance company to establish that defense. The judgment in favor of the insured was affirmed.

In *Penn Mutual Life Ins. Co.* v. *Mechanics' Savings B. & T. Co.,* 72 Fed. 413, 441, the court held that the burden to establish the materiality of the alleged concealment was on the defendant.

These authorities definitely and conclusively sustain the proposition of law here advanced by respondents. We respectfully urge that your Honors will look in vain in the record in the case at bar to find any evidence from which it could reasonably be concluded that the petitioner sustained the burden of establishing the affirmative defense interposed by it as a ground for defeating recovery by the respondents. It is to be borne in mind that there is no evidence in the record which establishes that the respondents did not reveal to William H. Donovan, Senior, at the time the policy was issued, the very facts which petitioner complains were fraudulently concealed. If it should be urged, and if urged it would be without foundation in the record, that the petitioner did adduce competent evidence to sustain the burden imposed on it to establish this affirmative defense, petitioner would then find itself confronted with the unanswerable bar that in any event such defense was a question of fact for the jury, and the jury resolved the issue in favor of respondents.

By an adroit method of presentation and specious reasoning the petitioner is attempting to impose upon the respondents the burden of showing that petitioner's agent had knowledge of the facts alleged to be material and to have been fraudulently concealed from petitioner and thereby hopes to persuade this Court that error was committed by the courts below. The basic misconception of the petitioner lies in the fact that it seeks to thrust upon respondents the burden of establishing the nature and extent of its agent's knowledge, and thereby seeks to escape from its complete failure to adduce any evidence upon this question of its agent's knowledge.

The statement made that knowledge of an agent acquired in the transaction of his own or another's business is not the knowledge of his principal unless such agent had such

knowledge presently in mind at the time of acting for such principal, may be correct under some circumstances and incorrect under others. In the case at bar the evidence shows William H. Donovan, Senior, was the petitioner's general agent at all material times mentioned in the testimony. It seems a fair statement that the court should properly take judicial notice of the fact that the general agent's activities for his company included the solicitation and writing of insurance. We submit that if in the course of his duties as petitioner's general agent Donovan, Senior, learned something about the respondents which would be material if the petitioner were to insure their property, and that thereafter said Donovan, Senior, for the petitioner did so insure them, then that insurance was written with knowledge of such material fact. See Mechem on Agency (2nd Ed.), Vol. 2, page 1395-6.

The situation which obtained at the time respondents procured the issuance to them of the policy of insurance here sued on is aptly stated by the court in *Carolina Ins. Co.* v. *Christopher,* 80 S.W. 2d 774 (Texas) where the court said (p. 777):

> "Plaintiff and defendant's agent lived in the same village, and the rule has been announced that, if the insurer's agent lives in the vicinity of the property and is familiar therewith, the insurer will be charged with knowledge of facts readily ascertainable. *Commercial Fire Ins. Co.* v. *Allen,* 80 Ala. 571, 1 So. 202; *Ritchey* v. *Home Ins. Co.,* 104 Mo. App. 146, 78 S. W. 341; *Short* v. *Home Ins. Co.,* 90 N. Y. 16, 43 Am. Rep. 138."

We therefore respectfully urge that for the foregoing reasons the trial court properly refused to give petitioner's requested instruction 4, and the refusal to give that instruction was proper for the reason that there was no evidence to support it.

We have previously called attention to the fact that the testimony showed there was only one agent of the petitioner whose knowledge of Roberto's indictment, conviction, imprisonment and deportation could bind the petitioner, that is, Donovan, Senior. The instruction in question was drawn on the theory that there were two or more such agents, as evidenced by the use of the plural in the word "agents" in such instruction.

Again the issue of fraudulent concealment was raised as an affirmative defense and the petitioner had the burden of showing that respondents failed to reveal the facts of which petitioner now complains. Petitioner's proof failed to establish this defense. Donovan, Senior, did not testify, and while Donovan, Jr., claimed that he did not know of Roberto's troubles that is negative evidence and does not establish that Donovan, Senior, or petitioner, did not know these facts. On this point there was no evidence. Since the petitioner failed to introduce evidence to establish its affirmative defense instruction 4 was properly refused by the court.

Petitioner seems to misapprehend the purport of the evidence relative to the newspaper articles, the respondents' acquaintance with Donovan, Senior, and the fact that there were prior business and insurance transactions between them. This evidence was offered in support of the proposition that there was no concealment perpetrated by the respondents on the petitioner. We believe it was proper for the jury to consider all these facts in determining whether there was any concealment, or whether, if the jury should find there was concealment, it was fraudulent or intentional.

The instruction is uncertain, ambiguous and confusing in its language and expression. The references to "the knowledge" which an insurance company's agents may

have acquired might well have been understood by the jury to have pertained, for example, to the fact that the respondent Ammirati's citizenship papers were surrendered by him in 1937, a fact of which petitioner's counsel made much. Again, the instruction might have been understood as informing the jury that the respondents must show that Donovan, Senior, knew of the unrecorded deeds to them. Counsel for respondent will say that the word "knowledge" as used in this instruction referred to Roberto's indictment, conviction, imprisonment and deportation. The defect in the instruction is that it did not so state and the jury had no way of reading this meaning into it.

An examination of this instruction reveals clearly that it embodies an abstract proposition of law, and its refusal was not prejudicial error.

7.

No error was committed by the trial court in refusing to permit counsel for petitioner to read to the jury from the stipulation facts orally admitted upon the trial; and in any event such refusal would be harmless error.

The statement of counsel for petitioner under this caption of its brief is not a fair presentation of what transpired in the trial court. It is first to be pointed out that the stipulation was officially a part of the court files (Tr. 109 and 152) and therefore no necessity existed for its formal introduction in evidence.

In the early part of the trial counsel for respondents desired to read to the jury two newspaper articles introduced in evidence in behalf of the respondents (respondents'-plaintiffs' Exhibits 156 and 157; Tr. 228 and 229, respectively), and at that time a short colloquy occurred between both counsel and the court, in the course of which

counsel for respondents stated that he admitted the conviction of Roberto on the charge of perjury and the affirmance of that conviction(Tr. 132).

At the conclusion of respondents' case in chief counsel for respondents read to the jury the stipulation from its beginning up to and including paragraph numbered 11 (Tr. 148, *et seq.*).

Further colloquy then took place between the court and counsel (Tr. 152) at the conclusion of which respondents rested their case. Thereupon counsel for petitioner stated that he desired to offer and read in evidence from that stipulation, and for the purpose of convenience the stipulation was marked defendant's (petitioner's) Exhibit 121 (Tr. 135). Counsel for petitioner then read certain paragraphs of the stipulation, and as to paragraphs not then read the court stated that everything contained in the paragraphs not read had been admitted by counsel for respondents (Tr. 155) and therefore the court would not permit counsel for petitioner to read such portions of the stipulation because it was a repetition and a waste of time (Tr. 155).

Counsel for petitioner, however, have carefully avoided pointing out that all of the exhibits introduced in evidence, which of course included this stipulation, were taken by the jury to the jury room upon its retirement to consider its verdict (Tr. 222).

It is urged on behalf of the petitioner that under these circumstances it was denied due process of law. Counsel for petitioner have cited no case which even remotely approaches the case at bar.

The first case cited by the defendant under this caption is *Ballard* v. *Hunter,* 204 U. S. 241. In that case a writ of error was prosecuted to review a judgment sustaining the validity of a sale of the lands of plaintiffs in error for

non payment of levee taxes. We are at a loss to perceive how and in what manner this authority has any application to the case at bar.

In *Hurtado* v. *California,* 110 U. S. 516, next cited by the defendant, Hurtado by an information filed against him was charged with the crime of murder and upon this information, and without previous investigation of the matter by any grand jury, he was arraigned and pleaded not guilty. A trial was thereafter had and the jury rendered its verdict in which it found Hurtado guilty of murder. From the judgment fixing the death penalty an appeal was taken. The judgment was affirmed.

It was claimed on behalf of Hurtado that the conviction and sentence were void on the ground that they were repugnant to the Fourteenth Article of the Amendments to the Constitution of the United States. We do not perceive that this authority has the least application to the case at bar.

All of the remaining cases cited by the petitioner under this caption of their brief are so-called "rate" cases, except *Railroad Retirement Board* v. *Alton R. R. Co.,* 295 U. S. 330, which was an action under the Railroad Retirement Act. A careful reading of each of these cases fails to disclose how any one of them is applicable to the case at bar, and how any one of them would serve to enlighten this Court or aid in a correct disposition of this petition for certiorari.

We reiterate that the refusal of the trial court to permit counsel for the petitioner to read portions of the stipulation with reference to facts which were admitted in the presence of the jury to be true, hardly warrants serious consideration in view of the host of opinions by Federal Courts that if there were error in such refusal it was harmless error.

Moreover the statutory enactment upon this subject likewise completely answers the propositions here urged by the defendant. In U.S.C.A., Title 28, Section 391, it is provided:

> "• • • On the hearing of any appeal, certiorari, writ of error, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to the technical errors, defects, or exceptions which do not affect the substantial rights of the parties."

As illustrative of the rule we respectfully direct the attention of your Honors to *St. Louis & S. F. R. R. Co.* v. *Duke, Admx.*, 192 Fed. 306, which was an action for wrongful death. In affirming the judgment and in passing upon the receipt in evidence of certain testimony which the defendant urged was improper the court said (p. 309):

> "The admission of improper evidence over objection to establish facts proved by other evidence introduced without the objection is harmless error. (Citing authorities)."

We respectfully assert that *Great American Ins. Co.* v. *Roney & Berger Co.*, 42 F. 2d 816, is a full and complete answer adversely to the contention of the petitioner here advanced. In this authority there had been issued to Roney & Berger Co., policies of insurance by nine insurance companies for different sums which together amounted to $205,000.00. A fire occurred, resulting in a total loss of all the properties insured. When the insurance companies refused to pay, Roney & Berger Co. sued them in the State court. For lack of diversity of citizenship one suit was tried there. The remaining eight were removed to the District Court of the United States where by stipulation they were tried as one case. The plaintiffs had a ver-

dict for a total sum which was apportioned by counsel among the several defendant companies, and judgments were entered against them for their allocated amounts respectively. The eight companies appealed and, the assignments of error being identical, the cases were heard together and treated as one case.

Due to the fact that the plaintiff's books had been burned in the fire the extent of the properties destroyed and their value as shown by the books were impossible of ascertainment and therefore both parties were driven to other sources for information so that plaintiff might make a schedule for its statement of claim and to prove loss at the trial, and the defendants might resist the plaintiff's claim. In consequence there was a running fight on the value of the plant, machinery and the like. All this resulted in a mass of evidence greatly confused and sharply conflicting, which disclosed a spread between the plaintiff's total value claim of $239,585.04 and the defendants' proof of $108,302.25, through which the jury entered with a verdict for $204,416.00.

As the case involved many figures concerning the sound value of properties of different kinds, on which the parties had produced widely different testimony, the court suggested and counsel agreed to hand the jury, on retiring, statements as to their respective claims of the loss sustained. The plaintiff submitted its statement, but through a clear mistake of somebody the statement of the defendants, though produced in court, was not given to the jury. Thus the jury had, visually, the figures of the plaintiff and, mentally, those of the defendants. The failure of the jury to have the statement of the defendants was discovered only after verdict, and first came to the attention of the court on motion for a new trial.

The defendants urged that they were entitled to a new trial because of the prejudice resulting from the absence of their statement in the jury room and that the reviewing court should in justice set aside the judgment.

The reviewing court determined that although it was regrettable that the defendants' statement was not taken by the jury upon retiring, nevertheless the court was not convinced that thereby the defendants were in any wise prejudiced.

In the case at bar the entire stipulation was taken by the jury to its room upon retiring to consider its verdict. All of the exhibits were given to the marshal and by him to the jury in accordance with the usual practice (Tr. 222).

Surely if it can be said that in the above authority the defendants there were not prejudiced by the failure of the jury to have with it the defendants' statement, then beyond any question the petitioner in the case at bar was in no wise named by the ruling of the trial judge. Since the jury did take with it the stipulation and unquestionably read it in its entirety the only proper complaint that can be leveled against the ruling of the trial judge is that the jury, having heard the admissions made by counsel for respondents as to the contents of the particular paragraphs of the stipulation here under consideration, did not hear counsel for petitioner read the particular paragraphs to it, although with greater facility for understanding and consideration the entire stipulation was before it in its deliberations on all the evidence. We respectfully urge that this simple statement of what transpired in the trial is a full and complete refutation of this contention of the petitioner.

In *Missouri Valley Bridge & Iron Co.* v. *Blake,* 231 Fed. 417, plaintiff had instituted an action for personal injury

which he received while an employee of the defendant. There was a verdict and judgment for the plaintiff, and the defendant upon appeal asserted as grounds for reversal rulings upon the admission or exclusion of testimony. In affirming the judgment the court said (p. 422):

> "In the trial of a case of this kind it is hardly to be expected that some question will not be asked or reply made which, taken by itself, would be open to objection; and if every theoretical error led to reversal there would be no end to litigation. But the verdict of a jury is not to be lightly set aside, and mistakes which do not involve injustice should ordinarily be disregarded."

In *Spring Garden Ins. Co.* v. *Wood,* 233 Fed. 223 (certiorari denied 242 U. S. 631), an action had been instituted on a fire insurance policy. There was a judgment for plaintiff which was affirmed. One of the grounds urged for reversal was that the trial court refused to receive as evidence plaintiff's reports of other policies. The court held that this was not reversible error since the plaintiff admitted as true all that would have appeared from these reports (p. 266).

In *Compagnie Generale Transatlantique* v. *Bump,* 234 Fed. 52 an action was instituted by Theresa M. Bump against the defendant steamship company for personal injuries sustained by her while a passenger on a steamboat owned by it. The District Court entered a judgment upon the verdict of the jury in favor of the plaintiff.

In its opinion the court stated (p. 55):

> "• • • In every hotly contested jury trial a lawyer who reads the record with a desire to find some action by the trial judge which is open to criticism, will generally be successful. The most learned and conscientious judge will frequently make a ruling which subsequent testimony and further reflection show to

have been of doubtful propriety. But if it appears that the ruling was inconsequential and that the result was a just and proper one, it would be a manifest injustice because of such ruling to start the parties again up on the weary pilgrimage through the courts."

In *Weiner* v. *Union Trust Co.,* 261 Fed. 709, the court held (p. 713) that "where it is evident that a correct result has been reached, questions concerning the correctness of particular rulings, not affecting such result are immaterial." (Citing a number of authorities).

In *Press Publishing Co.* v. *Monteith,* 130 Fed. 356, an action for libel was instituted and a judgment given for the plaintiff. In affirming the judgment the court said (p. 362):

> "The objection of all litigation should be to arrive at a just result by a most direct, speedy and inexpensive proceeding. If such a result can be reached by absolutely inerrant methods so much the better, but while the administration of justice is in the hands of merely finite beings, such perfection can hardly be expected. I venture to think that no long continued, hotly contested trial can be conducted to a conclusion without mistakes being committed. Few minds are so constituted that they can grasp at the outset all the ramifications of a complicated controversy and, before the judge can get the perspective of the trial, some mistakes may occur, but these should be disregarded if it can be seen that the case was correctly decided and that, even if they had not been made, the same result would have been reached. Justice can be attained without infallibility."

It is urged by counsel for petitioner that the procedure adopted by the trial court, if it stands unrebuked, would lay a foundation for a procedure by which the right of all of our citizens to a fair and impartial trial by jury

would be destroyed. Just how that calamity would result is not pointed out. We exhibit little fear, and we respectfully urge that this Court need have no fear, that the trial by jury as it has been recognized since the adoption of our Constitution would thus be destroyed.

CONCLUSION.

For the many reasons above stated, it is respectfully submitted that the petition for certiorari is without merit and should be denied. No constitutional question is presented. The issues it seeks to raise are evidentiary in character and without public importance. They have been fully reviewed by the Court of Appeals. Their reconsideration by this Court is neither required nor desirable.

We respectfully ask that this Court deny the writ of certiorari.

Respectfully submitted,

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